



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

HARVARD LAW LIBRARY



3 2044 078 565 736



HARVARD LAW LIBRARY

Received JAN 11 1916

REPORTS
OF
CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI

Between February 2, 1917, and June 30, 1917.

PERRY S. RADER,
REPORTER.

VOL. 270.

COLUMBIA, MO.:
E. W. STEPHENS PUBLISHING CO.
1917

Entered according to act of Congress in the year 1917 by
E. W. STEPHENS PUBLISHING CO.
In the office of the Librarian of Congress at Washington, D. C.

JAN 11 1918

(ii)

JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS

HON. WALLER W. GRAVES, Chief Justice.

HON. HENRY W. BOND, Judge,

HON. ROBERT FRANKLIN WALKER, Judge.

HON. CHARLES B. FARIS, Judge.

HON. JAMES T. BLAIR, Judge.

HON. ARCHELAUS M. WOODSON, Judge.

HON. FRED L. WILLIAMS, Judge.

FRANK W. McALLISTER, Attorney-General.

J. D. ALLEN, Clerk.

H. C. SCHULT, Marshal.

JUDGES OF THE SUPREME COURT

BY DIVISIONS

DIVISION ONE.

HON. HENRY W. BOND, Presiding Judge.

HON. JAMES T. BLAIR, Judge.

HON. WALLER W. GRAVES, Judge.

HON. ARCHELAUS M. WOODSON, Judge.

HON. ROBERT T. RAILEY, Commissioner.

HON. STEPHEN S. BROWN, Commissioner.

DIVISION TWO.

HON. ROBERT FRANKLIN WALKER, Presiding Judge.

HON. CHARLES B. FARIS, Judge.

HON. FRED L. WILLIAMS, Judge.

HON. REUBEN F. ROY, Commissioner.

HON. JOHN TURNER WHITE, Commissioner.

TABLE OF CASES REPORTED IN THIS VOLUME.

A

Ackley, In re Mississippi & Fox River Drainage District; Buschling v.	157
American Manufacturing Company v. City of St. Louis	40
American Manufacturing Company (State ex rel.) v. Anderson ..	533
American Manufacturing Company (State ex rel.) v. Reynolds ..	589
American Medical Journal (Hamlin and), Link v.	319
Anderson, State ex rel. American Manufacturing Company v.	533
Atchison, Topeka & Santa Fe Railway Company, Foster Lumber Company v.	629
Atchison, Topeka & Santa Fe Railway Company, State ex rel. Vaught v.	251

B

Bambrick Brothers Construction Company v. Clarke	460
Bambrick Brothers Construction Company v. Semple Place Realty Company	450
Barker (State ex inf.) v. Koeln	174
Barker (State ex rel.) v. Scott	146
Berthold & Jennings Lumber Company, Carson v.	238
Bingaman v. Hannah	611
Braeuel v. Reuther	603
Broughton, Phillips v.	365
Burchett, Handlin v.	114
Buschling (In re Mississippi & Fox River Drainage District) v. Ackley	157

C

Carson v. Berthold & Jennings Lumber Company	238
Carthage (City of), Whitsett v.	269
Carthage Special Road District of Jasper County v. Ross	76
Catterlin, Marston v.	5
Central Coal & Coke Company (State ex rel.) v. Ellison and Holvey ..	645
Chester, Perryville & Ste. Genevieve Railway Company (State ex rel.) v. Turner	49
Chicago & Alton Railroad Company (Public Service Commission and), State ex rel. Rhodes v.	547
Chicago, Milwaukee & St. Paul Railway Company, Johnson v. ..	418
City of Carthage, Whitsett v.	269
City of St. Louis, American Manufacturing Company v.	40
Clark, In re Estate of	351
Clarke, Bambrick Brothers Construction Company v.	460
Clay County (State ex rel.) v. Hackman	658
Conkling (State ex inf.) ex rel. Hendricks v. Sweaney	685
Cummins, Shacklett v.	496

D

Dalton v. Simpson	287
Delano, White v.	16
270 Mo.]	(v)

Dick & Bros. Quincy Brewing Company, State ex rel. Weatherby v.	100
Douglas (State ex rel.) for benefit of Drainage District No. 4 of Dunklin County v. Redman	465
Drainage District No. 4 of Dunklin County (State ex rel. Douglas for benefit of) v. Redman	465

E

Eastin, State ex rel. St. Joseph Water Company v.	193
Ellison, State ex rel. Security Insurance Company v.	47
Ellison and Holvey, State ex rel. Central Coal & Coke Company v.	645
Ex parte Holman	696

F

Fidelity Mutual Insurance Company, McKinney v.	305
Fidelity Trust Company v. Mexico, Santa Fe & Perry Traction Company	487
Field, Kansas City v.	500
Flournoy v. Kirkman	1
Foster Lumber Company v. Atchison, Topeka & Santa Fe Railway Company	629

G

Granger (Sisson and), State v.	59
Granite Bituminous Paving Company v. Park View Realty & Improvement Company, Orr and Nina Realty Company	698
Gunn v. United Railways Company	517

H

Hackman, State ex rel. Clay County v.	658
Hamlin and American Medical Journal, Link v.	319
Handlin v. Burchett	114
Hannah, Bingaman v.	611
Harty (Hunter and), Norman's Land & Manufacturing Company v.	62
Hendricks (State ex inf. Conkling ex rel.) v. Sweaney	685
Holman, Ex parte	696
Holvey (Ellison and), State ex rel. Central Coal & Coke Company v.	645
Hunter and Harty, Norman's Land & Manufacturing Company v.	62

I

In Matter of Assessment of Collateral Inheritance Tax in Estate of Charles Clark; Grace Clark, Appellant	351
In re Estate of Clark	351
In re Mississippi & Fox River Drainage District; Buschling v. Ackley	157

J

Johnson v. Chicago, Milwaukee & St. Paul Railway Company	418
Jones v. Kirk	408
Jones and Ramsey, State ex rel. St. Joseph Lead Company v.	230

K

Kansas City v. Field	500
Kenzell (Western Union Telegraph Company and), Phillips v.	676
Kippenbrock v. Wabash Railroad Company	479
Kirk, Jones v.	408
Kirkman, Flournoy v.	1
Kloepple, Schneider v.	389
Koeln, State ex inf. Barker v.	174

L

Link v. Hamlin and American Medical Journal	319
---	-----

Mc

McKinney v. Fidelity Mutual Insurance Company.....	305
--	-----

M

Marston v. Catterlin	5
Mexico, Santa Fe & Perry Traction Company, Fidelity Trust Company v.	487

N

Nina Realty Company (Park View Realty & Improvement Company, Orr and), Granite Bituminous Paving Company v.	698
Norman's Land & Manufacturing Company v. Hunter and Harty..	62

O

Orr, Nina Realty Company, Park View Realty & Improvement Company and, Granite Bituminous Paving Company v.	698
---	-----

P

Park View Realty & Improvement Company, Orr and Nina Realty Company, Granite Bituminous Paving Company v.	698
Parker (Robinson and), State ex rel. Woodson v.	212
Peterson v. United Railways Company	67
Phillips v. Broughton	365
Phillips v. Western Union Telegraph Company and Kenzell	676
Powers, Turpin v.	338
Public Service Commission and Chicago & Alton Railroad Company, State ex rel. Rhodes v.	547
Public Service Commission, State ex rel. United Railways Company v.	429

R

Ramsey (Jones and), State ex rel. St. Joseph Lead Company v..	230
Redman, State ex rel. Douglas for benefit of Drainage District No. 4 of Dunklin County v.	465
Reed, Wilson v.	400
Reuther, Braeuel v.	603
Reynolds, State ex rel. American Manufacturing Company v.	589
Rhodes (State ex rel.) v. Public Service Commission and Chicago & Alton Railroad Company	547
Ripley County, Wright Lumber Company v.	121
Robertson v. Robertson	137
Robinson and Parker, State ex rel. Woodson v.	212
Ross, Carthage Special Road District of Jasper County v.	76

S

St. Joseph Lead Company (State ex rel.) v. Jones and Ramsey	230
St. Joseph Water Company (State ex rel.) v. Eastin	193
St. Louis (City of), American Manufacturing Company v.	40
St. Louis & San Francisco Railroad Company, Thompson v.	87
Schneider v. Kloepple	389
School Districts Nos. 52 and 53 of Cass County (State ex rel.) v. Wright	376
Scott, State ex rel. Barker v.	146
Security Insurance Company (State ex rel.) v. Ellison	47
Seiple Place Realty Company, Bambrick Brothers Construction Company v.	450
Shacklett v. Cummins	496
Simpson, Dalton v.	287
Sisson and Granger, State v.	59
State v. Sisson and Granger	59

State v. Swift & Company	694
State ex inf. Barker v. Koeln	174
State ex inf. Conkling ex rel. Hendricks v. Sweaney	685
State ex rel. American Manufacturing Company v. Anderson	533
State ex rel. American Manufacturing Company v. Reynolds	589
State ex rel. Barker v. Scott	146
State ex rel. Central Coal & Coke Company v. Ellison and Holvey	645
State ex rel. Chester, Perryville & Ste. Genevieve Railway Com- pany v. Turner	49
State ex rel. Clay County v. Hackman	658
State ex rel. Douglas for benefit of Drainage District No. 4 of Dunk- lin County v. Redman	465
State ex rel. Rhodes v. Public Service Commission and Chicago & Alton Railroad Company	547
State ex rel. St. Joseph Lead Company v. Jones and Ramsey	230
State ex rel. St. Joseph Water Company v. Eastin	193
State ex rel. School Districts Nos. 52 and 53 of Cass County v. Wright	376
State ex rel. Security Insurance Company v. Ellison	47
State ex rel. United Railways Company v. Public Service Com- mission	429
State ex rel. Vaught v. Atchison, Topeka & Santa Fe Railway Company	251
State ex rel. Weatherby v. Dick & Bros. Quincy Brewing Company	100
State ex rel. Woodson v. Robinson and Parker	212
Sweaney, State ex inf. Conkling ex rel. Hendricks v.	685
Swift & Company, State v.	694

T

Thompson v. St. Louis & San Francisco Railroad Company	87
Turner, State ex rel. Chester, Perryville & Ste. Genevieve Railway Company v.	49
Turpin v. Powers	338

U

United Railways Company, Gunn v.	517
United Railways Company, Peterson v.	67
United Railways Company (State ex rel.) v. Public Service Com- mission	429

V

Vaught (State ex rel.) v. Atchison, Topeka & Santa Fe Railway Company	251
--	-----

W

Wabash Railroad Company, Kippenbrock v.	479
Weatherby (State ex rel.) v. Dick & Bros. Quincy Brewing Com- pany	100
Western Union Telegraph Company and Kenzell, Phillips v.	676
White v. Delano	16
Whitsett v. City of Carthage	269
Wilson v. Reed	400
Woodson (State ex rel.) v. Robinson and Parker	212
Wright Lumber Company v. Ripley County	121
Wright, State ex rel. School Districts Nos. 52 and 53 of Cass County v.	376

CASES OVERRULED OR DISAP- PROVED.

Callier v. Railroad, 158 Mo. App. 249	49
State ex rel. Waterworks Co. v. Geiger, 246 Mo. 74	193
State ex rel. St. Louis County v. Gordon, 268 Mo. 713 (<i>obiter dic- tum</i>)	659

TABLE OF CASES CITED

IN THIS VOLUME.

A

Abbott v. Duluth, 104 Fed. 833	669
Adams v. Buchanan, 49 Mo. 64	65
Albers Comm. Co. v. Spencer, 236 Mo. 628	35
Allen v. Moss, 27 Mo. 364	65
American Mfg. Co. v. St. Louis, 192 S. W. 399	596
American Mfg. Co. v. St. Louis, 238 Mo. 267	46, 595, 596, 600, 601
American Silver Mfg. Co. v. Wabash R. R. Co., 174 Mo. App. 184 ..	636
Anderson v. Pemberton, 89 Mo. 64	173
Andrews' Exrs. v. Andrews' Admr., 7 Ohio St. 143	607
Ansen v. Tuska, 19 Abb. Pr. 391	538
Armour Packing Co. v. United States, 209 U. S. 56	204, 206, 643
Artz v. Railroad, 44 Iowa, 284	484
Ashby v. Gravel Road Co., 111 Mo. App. 79	628
Atlantic Express Co. v. Railroad, 111 N. C. 463	563, 564
Auerbach v. Railway, 73 N. Y. S. 118	538
Aull v. Day, 133 Mo. 337	303

B

Bailey v. Winn, 101 Mo. 656	405
Balkum v. Wood, 58 Ala. 642	66
Bambrick Bros. Constr. Co. v. McCormick, 157 Mo. App. 204	460
Bambrick Bros. Constr. Co. v. Realty Co., 270 Mo. 450	464, 465
Bank v. Manning, 133 Mo. App. 298	248
Bank v. Murdock, 62 Mo. 70	653
Banks v. Burnam, 61 Mo. 76	210
Barber Asphalt Pav. Co. v. French, 158 Mo. 534	636
Barnes v. Construction Co., 257 Mo. 195	478
Bassett v. O'Brien, 149 Mo. 381	405
Bates v. Ryberg, 40 Cal. 463	610
Bayless v. Gibbs, 251 Mo. 492	243
Becke v. Railway Co., 102 Mo. 552	484
Beckner v. McLinn, 107 Mo. 277	300
Beyer v. Transit Development Co., 124 N. Y. S. 463	538
Billings v. People, 189 Ill. 472	364
Birmingham Drainage District v. Railroad, 266 Mo. 60	170, 171, 173
Blanchard v. Dorman, 236 Mo. 416	302
Blankinship v. Israel, 132 Ill. 514	349
Blount v. Spratt, 113 Mo. 54	406
Blum v. N. Y. Life Ins. Co., 197 Mo. 513	315
Boorman v. Sunnuchs, 42 Wis. 233	129
Bovill v. Moore, 2 Coop. C. C. 56	543
Bowen v. Hixon, 45 Mo. 340	223
Bowers v. Smith, 111 Mo. 52	349
Boyd v. Ellis, 107 Mo. 401	65
Boyd v. Railroad, 236 Mo. 54	423, 424, 427, 428
Boyd v. Railroad, 249 Mo. 110, 155 S. W. 13 ..	423, 424, 426, 427, 428, 429
Brace v. Railroad, 27 N. Y. 269	669
Bradford v. Blossom, 207 Mo. 228	605
Bradshaw v. Edelen, 194 Mo. 640	135

(x)

[270 Mo.

Brewington v. Brewington, 211 Mo. 48	300
Bridge Company v. Corrigan, 251 Mo. 667	689
Briggs v. Garrett, 111 Pa. St. 414	337
Bristol v. Ontario Orphan Asylum, 22 Atl. (Conn.) 848	398
British-American Portland Cement Co. v. Citizens Gas Co., 255 Mo. 1	29
Browne v. Railroad, 108 N. C. 34	524
Brunn v. Kansas City, 216 Mo. 108	515
Budd v. New York, 143 U. S. 517	563, 570, 583
Burling v. Railway, 85 Ill. 20	484
Burnett v. McCluey, 92 Mo. 230	145
Bush v. White, 85 Mo. 358	65
Byrd Irr. Co. v. Smythe, 146 S. W. (Tex. Civ. App.) 1064	542

C

Cabell v. Grubbs, 48 Mo. 353	65
Caldwell v. Renfro, 99 Mo. App. 376	608
Callier v. Railroad, 158 Mo. App. 249	57, 58, 59
Campbell v. Greer, 209 Mo. 199	248
Canal Trustees v. Haven, 5 Gilm. 548	129
Carder v. Drainage District, 262 Mo. 542	174, 389
Carpenter v. St. Joseph, 263 Mo. 711	113
Cater v. Hornback, 139 Mo. 243	135
Case v. Carland, 264 Mo. 463	403
Casey v. St. Louis Transit Company, 116 Mo. App. 235	421, 422
Casey v. St. Louis Transit Company, 205 Mo. 721	421
Castello v. St. Louis Circuit Court, 28 Mo. 259	222
Chadwick v. Carson, 78 Ala. 116	66
Chamberlain v. Iowa Telephone Co., 119 Iowa, 619	669
Chambers v. Railway, 207 U. S. 142	29
Chandler v. Railroad, 251 Mo. 599	112
Chandos v. Mack, 77 Wis. 573	130
Cherbonnier v. Cherbonnier, 108 Mo. 263	499
Chisholm v. Shields, 67 Ohio St. 374	364
Chrismer v. Bell Tel. Co., 194 Mo. 208	95
Cigar Makers' International Union v. Goldberg, 61 Atl. 457	426
City of St. Joseph to use v. Owen, 110 Mo. 445	285
City of St. Louis v. Gaslight Co., 70 Mo. 69	36
City of St. Louis v. Gaslight Co., 82 Mo. 349	35
City of St. Louis v. United Rys., 263 Mo. 387	697
Claffin v. McDonough, 33 Mo. 412	596, 597, 600
Clark v. McAtee, 227 Mo. 152	136
Clark v. Robinson, 88 Ill. 498	349
Clark v. Tulare Lake Dredging Co., 14 Cal. App. 414	540
Clarkston v. Insurance Co., 190 Mo. App. 631	318
Clay Center v. Williamson, 79 Kan. 485	35
Cloverdale Homes v. Cloverdale, 62 So. 712	208
Clute v. Fisher, 65 Mich. 48	129
Coal & Coke Ry. Co. v. Conley, 67 W. Va. 129, 230 U. S. 522	27, 32, 33
Cocker v. Cocker, 56 Mo. 180	260
Colasurdo v. Railroad, 180 Fed. 835	485
Collins v. Pease, 146 Mo. 135	245
Collins v. Railroad, 30 Minn. 33	484
Commonwealth v. Twitchell, 1 Brewster (Pa.), 551	540
Cook v. Publishing Co., 241 Mo. 326	336
Cook v. Universalist General Convention, 101 N. W. (Mich.) 217	399
Cooke v. Manufacturing Co., 29 Hun, 641	538
Cooley v. Golden, 117 Mo. 33	129
Cornelius v. Cornelius, 233 Mo. 1	336, 337
Cousins v. Railroad, 96 Mich. 386	527
Cox v. Mignery & Co., 126 Mo. App. 682	248
Craig v. Railroad, 248 Mo. 270	689
Cravens v. Faulconer, 28 Mo. 19	627

Crompton's Estate, 10 Pa. County Ct. 443	364
Crosby v. Potts, 8 Ga. App. 463	540
Crowley v. Wallace, 12 Mo. 147	65

D

Damont v. Railroad, 9 La. Ann. 441	524
Danahy v. Kellogg, 127 N. Y. S. 444	538
Davidson v. Real Estate Co., 249 Mo. 474	303
Decker v. Diemer, 229 Mo. 296	84, 85, 265, 268
Degonia v. Railroad, 224 Mo. 589	653
DeHatre v. Edmonds, 200 Mo. 275	245
Denver v. Denver Union Water Co., 41 Colo. 77	207
Des Moines v. Waterworks Co., 95 Iowa, 348	205
Dessaunier v. Murphy, 22 Mo. 95	415, 417
Detroit v. United Ry. Co., 173 Mich. 314	205
Dickey v. Holmes, 208 Mo. 664	696
Diehm v. Insurance Co., 129 Mo. App. 256	315
Diffenderffer v. Griffith, 57 Md. 81	609
Donovan v. Wells Fargo, 265 Mo. 291	636
Dow v. Beidelman, 125 U. S. 680	563
Drainage District v. Railroad, 216 Mo. 709	165, 168, 174
Dunlap v. Henry, 76 Mo. 108	65
Durand v. Railroad, 65 N. J. L. 660	485

E

Earl of Macclesfield v. Davis, 3 Ves. & R. 16, 35 Eng Rep. 385 ..	540
Elsberry Drainage District v. Harris, 267 Mo. 139	171, 173
Emmel v. Hayes, 102 Mo. 193	438
Ewing v. Hoblitzelle, 85 Mo. 64	187
Ex parte Roberts, 166 Mo. 212	559
Eyssell v. St. Louis, 168 Mo. 607	464, 513

F

Fadden v. Satterlee, 43 Fed. 569	118
Fallbrook Irrigation District v. Bradley, 164 U. S. 112	164
Fehlhauer v. St. Louis, 178 Mo. 653	94
Ferrin v. Kenney, 51 Mass. 294	607
Field v. Clark, 143 U. S. 649	582, 583
Fleckenstein v. Baxter, 114 Mo. 496	66
Fletcher v. Boom Co., 51 Mich. 277	130
Fogle v. Pindell, 248 Mo. 65	303
Ford v. Unity Church Society, 120 Mo. 514	65
Forrey v. Holmes, 65 Mo. App. 114	700
Forsyth v. Smale, 7 Biss. 201	129
Fourche R. R. Co. v. Bryant Lbr. Co., 230 U. S. 316	640
Freeman v. Moffitt, 119 Mo. 280	15
Freeport Water Co. v. Freeport, 180 U. S. 587	207
Frost v. Weniz, 157 U. S. 58	191
Fruit Packing Co. v. Cutting, 133 Cal. 237	35
Frye v. Shepherd, 173 Mo. App. 200	406
Fulks v. Railroad, 111 Mo. 335	527
Fuller v. Dauphin, 124 Ill. 542	129

G

Gabal v. Railroad, 251 Mo. 267	484, 485
Gannon v. Gas Light Co., 145 Mo. 502	457
Gavett v. Railroad, 82 Mass. 501	524, 527
Gebhardt v. St. Louis Transit Co., 97 Mo. App. 383	73
George v. Middough, 62 Mo. 549	516
Georgia Banking Co. v. Smith, 128 U. S. 174	563

Georgia Railroad v. Smith, 70 Ga. 694	564, 571, 576
Gibson v. Gibson, 239 Mo. 490	396
Gibson v. Railroad, 225 Mo. 482	108
Ginnon v. Railroad, 3 Rob. 25	528
Given v. Wright, 117 U. S. 648	447
Glasgow v. Mo. Car & Foundry Co., 229 Mo. 585	417
Glaves v. Wood, 78 Mo. App. 351	94
Gold Issue Mining & Milling Co. v. Pennsylvania Fire Ins. Co., 267 Mo. 524	29
Goode v. Central Coal & Coke Co., 167 Mo. App. 169, 179 Mo. App. 207.	648
Gorton v. Harmon, 152 Mich. 476	484
Cranger v. Avery, 64 Me. 292	130
Cranger Cases, 94 U. S. 113	563
Grangers' Ins. Co. v. Brown, 57 Mass. 308	540
Gray v. McDonald, 104 Mo. 303	657
Gray v. Walker, 16 S. C. 143	441
Green City v. Martin, 237 Mo. 484	672, 673
Grigsby v. Russell, 222 U. S. 149	315
Gruender v. Frank, 267 Mo. 713	605
Gumm v. Hubbard, 97 Mo. 318	225
Gunn v. United Rys., 177 Mo. App. 512, 160 S. W. 540	519

H

Haeussler v. Missouri Iron Co., 110 Mo. 188	3
Hagar v. Reclamation District, 111 U. S. 701	164
Haldan v. Railroad, 30 U. C. C. P. (Canada) 89	524
Hale v. Stimson, 198 Mo. 145	224
Hannan v. Seldentopf, 113 Iowa, 658	15
Hardin v. Jordan, 140 U. S. 371	129
Hardware Co. v. St. Louis, 192 S. W. 394	600
Hardwick v. Railroad, 181 Mo. App. 156	485, 636
Hargadine v. Van Horn, 72 Mo. 370	144, 145
Haseltine v. Central National Bank, 155 Mo. 74	636
Hathaway v. Scott, 11 Paige Chan. 173	145
Hayes v. McReynolds, 144 Mo. 348	4
Haynes v. Trenton, 123 Mo. 336	540
Hays v. Railway, 108 Mo. 549	499
Head v. Insurance Co., 241 Mo. 413	316
Heinbach v. Heinbach, 262 Mo. 69	626
Heintz v. Transit Co., 115 Mo. App. 670	76
Hendricks v. Calloway, 211 Mo. 536	14
Henszey v. Coal Min. Co., 80 Fed. 178	540, 543
Herndon v. Railroad, 218 U. S. 135	30, 31
Hickey v. Hazard, 3 Mo. App. 480	132
Higbee v. Ellison, 92 Mo. 13	223
Hilliard v. Life Ins. Co., 117 N. W. 999	318
Hinkle v. Lovelace, 204 Mo. 227	141
Hogan v. Hinchey, 195 Mo. 533	403
Holloway to use v. Howell County, 240 Mo. 601	84
Holwerson v. Railroad, 157 Mo. 216	74
Hopkins v. Hopkins, 17 S. W. 865	318
Houck v. Yates, 82 Ill. 179	129
Houghton v. Meyer, 208 U. S. 149	35
Howard v. Brown, 197 Mo. 48	66
Howe v. Howe, 179 Mass. 546	364
Hudson v. Cahoon, 193 Mo. 547	113
Hughes v. Rader, 183 Mo. 630	627
Hunter v. Railroad, 126 N. Y. 18	524
Hurley v. Kennally, 186 Mo. 225	701, 703
Hutchinson v. Railroad, 195 Mo. 546	76

I

Indiana Ry. Co. v. Hoffman, 161 Ind. 593, L. R. A. 1916A, 1072.	205, 206
In re Babcock, 81 N. Y. App. Div. 645	364
In re Drainage District v. Voltmer, 256 Mo. 152	169
In re Estate of Soulard, 141 Mo. 642	609
In re Hickman, 101 Cal. 609	610
In re Sanborn, 98 Cal. 103	609
In the Matter of Brooklyn, W. & N. Ry., 72 N. Y. 245	449
In the Matter of Kings County Elevated Ry. Co., 41 Hun, 425	449
Intermountain Rate Cases, 234 U. S. 476	564
International Textbook Co. v. Gillespie, 229 Mo. 397	29
International Textbook Co. v. Pigg, 217 U. S. 91	29
Interstate Com. Comm. v. Railroad, 167 U. S. 479	563
Interstate Com. Comm. v. Railroad, 220 U. S. 235	641
Interstate Com. Comm. v. Railroad, 225 U. S. 342	641
Irrigation District v. Williams, 76 Cal. 367	165

J

Janney v. Spedden, 38 Mo. 395	375
Jarman v. Unionville School District, 264 Mo. 646	46
Jefferis v. E. Omaha Land Co., 134 U. S. 178	128, 129, 130
Johnson v. Houston, 47 Mo. 227	405
Johnson v. Railroad, 174 Mo. App. 16	419
Johnson v. Railroad, 70 Pa. 357	527
Johnston v. Southern Pacific Co., 150 Cal. 535	541
Jones v. Anheuser-Busch Brewing Assn., 188 S. W. 82	696
Jones v. Soulard, 24 How. 41	130

K

Kansas City v. Bacon, 147 Mo. 259	513
Kansas City v. Marsh Oil Co., 140 Mo. 471	512, 513
Kansas City v. Mulkey, 176 Mo. 229	506
Kansas City v. Ward, 134 Mo. 172	464, 513
Kansas City ex rel. v. Scarritt, 127 Mo. 642	513
Keaton v. Jorndt, 259 Mo. 179	210
Kelly v. Railroad, 70 Mo. 604	524, 527, 528
Kennedy v. Nichols, 68 N. Y. S. 1053	538
Kimbrell v. Railroad, 67 So. 586	564
King's Lake Drainage & Levee District v. Jamison, 176 Mo. 557.	168, 169
Kochersperger v. Drake, 167 Ill. 122	608
Koehring v. Muemminghoff, 61 Mo. 403	406
Kraut v. Crawford, 18 Iowa, 549	129

L

Lamar Township v. City of Lamar, 261 Mo. 171	153
Land & Lumber Co. v. Franks, 156 Mo. 689	65
Lankford v. Gebhart, 130 Mo. 621	349
Lauterer v. Railroad, 63 C. C. A. 38	524
Leavenworth Term. Ry. & B. Co. v. Atchison, 137 Mo. 218	173, 375
Lecompte v. Wash, 9 Mo. 551	406
Lewine v. Sup. Lodge K. P., 122 Mo. App. 554	315
Lewis County v. Tate, 10 Mo. 651	601
Ligon v. Hawkes, 110 Tenn. 521	607
Lilly v. Tobbein, 103 Mo. 477	397, 611
Lindsey v. Stephens, 229 Mo. 600	627
Little River Dr. Dist. v. Railroad, 236 Mo. 107	164
Little Rock Gas & Fuel Co. v. Coppedge, 172 S. W. (Ark.) 885	542
Locke v. Redmond, 6 Kan. App. 76	441
Lohmeyer v. Cordage Co., 214 Mo. 685	696

Love v. North American Co., 229 Fed. 103	37
Loyd v. Railroad, 53 Mo. 509	526
Ludwig v. Western Union Tel. Co., 216 U. S. 146	31
Lumber Co. v. Railroad, 216 Mo. 658	442
Lynch v. Bates, 139 Ind. 210	485
Lyne v. Marcus, 1 Mo. 410	608

M

McDonald v. Shaw, 98 S. W. (Ark.) 952	399
McGhee v. Walsh, 249 Mo. 280	511
McGrew v. Railroad, 230 Mo. 518	568
McWhorter v. Railroad, 24 Fla. 417	563
Maniaci v. Interurban Express Co., 266 Mo. 633	682
Mann v. Best, 62 Mo. 491	14
Mansur v. Botts, 80 Mo. 658	653
Mansur-Tebbetts Imp. Co. v. Ritchie, 143 Mo. 613	656
Marler v. Springfield, 65 Mo. App. 302	540
Marston v. Catterlin, 239 Mo. 390	9
Mason v. Black, 87 Mo. 329	15
Mason v. Massachusetts General Hospital, 93 N. E. (Mass.) 637..	399
Mason v. Perkins, 180 Mo. 707	65
Matter of Enston, 113 N. Y. 174	362
Matter of Estate of Marrey, 65 Cal. 287	610
Matter of McPherson, 104 N. Y. 324	363, 364
Matter of Sloane, 154 N. Y. 109	364
Matter of Vassar, 127 N. Y. 1	362
Mays v. Mays, 114 Mo. 536	627
Meikel v. Borders, 129 Ind. 529	15
Mercantile Trust Co. v. Columbus, 203 U. S. 311	209
Meriwether v. Love, 167 Mo. 514	374
Meyers v. Block, 120 U. S. 206	35
Meysenburg v. Schlieper, 48 Mo. 426	35
Middleton v. Dudding, 183 S. W. 443	396
Middleton v. Pritchard, 3 Scam. 510	129, 130
Miltenberger v. Miltenberger, 78 Mo. 27	629
Minot v. Boston Asylum, 7 Metc. (Mass.) 416	398
Missouri Historical Society v. Academy of Science, 94 Mo. 459 ..	397
Missouri Rate Cases, 230 U. S. 474	588
Mitchell v. Sparlin, 255 Mo. 124	689
Mitchell v. Starbuck, 10 Mass. 11	3
Mockowik v. Railroad, 196 Mo. 550	76
Montana Co. v. St. Louis Min. Co., 152 U. S. 160	542
Moore v. Moore, 25 Atl. (N. J.) 403	398
Morey Engineering & Cons. Co. v. St. Louis Artificial Ice Rink Co., 242 Mo. 241, 146 S. W. 1142	699
Morgan's Co. v. Railroad Com., 109 La. 247	581
Morrison v. Morey, 146 Mo. 563	164
Mound City Land & Stock Co. v. Miller, 170 Mo. 240	164
Mullen v. Hewitt, 103 Mo. 639	516
Mullins v. Kansas City, 268 Mo. 444	511, 512
Munn v. Illinois, 94 U. S. 113	563, 579
Murnane v. St. Louis, 123 Mo. 479	513
Murphy v. Railroad, 71 N. J. L. 5	524
Murray v. Transit Co., 176 Mo. 183	76
Mut. Ben. Life Ins. Co. v. Swett, 222 Fed. 200	315
Mutual Life Ins. Co. v. Griesa, 156 Fed. 398	540, 543

N

Nash v. Craig, 134 Mo. 353	224
Nelson v. Brodhack, 44 Mo. 596	245
Neville v. Railroad, 158 Mo. 293	525

Newberry v. Carpenter, 31 L. R. A. (Mich.) 163	538
New Haven Railroad v. Interstate Com. Comm., 200 U. S. 361 ..	640
Newmark v. Railroad, 111 N. Y. Supp. 379	527
Nishnabotna Dr. Dist. v. Campbell, 154 Mo. 151	173
Norman v. Horn, 36 Mo. App. 424	145
Norman v. Insurance Co., 237 Mo. 584	144
Northam v. United Rys. Co., 176 S. W. 227	531
Northern Coal & Coke Co. v. Bates, 146 Ky. 624	66
Northwestern Tel. Exch. Co. v. City of Minneapolis, 81 Minn. 140 ..	669

O

O'Fallon v. Daggett, 4 Mo. 343	132
Oregon R. R. & Nav. Co. v. Campbell, 173 Fed. 957	581
Otis v. Kennedy, 107 Mich. 312	15
Owens v. Railroad, 95 Mo. 169	545

P

Paramore v. Lindsey, 63 Mo. 63	248
Patterson v. Patterson, 200 Mo. 344	406
Patterson v. Yancey, 97 Mo. App. 681	260
Paul v. Railway Co., 82 Mo. App. 504	540
Peck v. St. Louis Transit Co., 178 Mo. 617	519, 531
Peckham v. Newton, 4 Atl. (R. I.) 758	399
Pence v. Railroad, 116 Iowa, 279	527
People v. Barkas, 255 Ill. 526	485
People v. Harper, 91 Ill. 357	571
People v. Loomis, 8 Wend. 396	348, 349
People v. McCormick, 208 Ill. 437	364
People ex rel. v. Chicago Tel. Co., 220 Ill. 238	205
People ex rel. v. Wilcox, 200 N. Y. 431, 94 N. E. 215	443
Perkins v. Fielding, 119 Mo. 149	286
Pere Marquette Boom Co. v. Adams, 44 Mich. 403	129
Peterson v. Railroad, 265 Mo. 462	187
Peterson v. Tacoma Ry. & Power Co., 60 Wash. 406	205
Phillips v. Bailey, 82 Mo. 639	407
Phillips v. W. U. Tel. Co., 194 Mo. App. 458	681
Pina Maya-Sisal Co. v. Mfg. Co., 105 N. Y. S. 482	538
Porter v. Mariner, 50 Mo. 368	65
Postmaster General v. Early, 12 Wheat. 148	345
Pullman Co. v. Kansas, 216 U. S. 56	31

Q

Quall v. Lomas, 200 Mo. 687	300
-----------------------------------	-----

R

Railroad v. Alsop, 176 Ill. 475	484
Railroad v. Aspell, 23 Pa. St. 147	528
Railroad v. Commission, 106 Va. 264	563
Railroad v. Dey, 35 Fed. 866	564, 571, 581, 583
Railroad v. Drainage Commrs., 200 U. S. 561	164
Railroad v. Earnest, 229 U. S. 120	486
Railroad v. Elliott, 184 U. S. 530	35
Railroad v. Estill, 147 U. S. 591	237
Railroad v. Garrett, 231 U. S. 298	564
Railroad v. Gore, 96 Ill. App. 553	527
Railroad v. Interstate Commerce Comm., 184 Fed. 118	564
Railroad v. Iowa, 94 U. S. 155	563, 570
Railroad v. Jones, 149 Ill. 361, 41 Am. St. 278, 24 L. R. A. 141	563, 564, 569, 575, 581, 582, 584
Railroad v. McNicholas, 98 Ill. App. 58	484

Railroad v. Minnesota, 134 U. S. 462	582
Railroad v. North Carolina Corp. Comm., 206 U. S. 19	564, 565
Railroad v. O'Connor, 223 U. S. 280	598
Railroad v. O'Hara, 150 Ill. 585	484
Railroad v. Otoe County, 16 Wall. 667	569
Railroad v. People ex rel., 73 Ill. 541	448
Railroad v. Pickard, 8 Colo. 163	524
Railroad v. Railroad, 63 Tex. 529	448
Railroad v. Railroad, 36 Conn. 196	449
Railroad v. Railroad, 45 Cal. 373	448
Railroad v. Railroad Com., 160 Mich. 355	564, 581
Railroad v. Railroad Com., 136 Wis. 146	564
Railroad v. Randolph Townsite Co., 103 Mo. 457	173
Railroad v. Schurmeir, 7 Wall. 272	129, 130
Railroad Comm. v. Central of Georgia Ry. Co., 170 Fed. 237	576, 577
Railroad Comm. v. Railroad, 71 S. C. 130	564
Railroad Commission Cases, 116 U. S. 307	563
Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362	563
Reilly v. Union Infirmary, 40 Atl. (Md.) 894	399
Reynolds v. Fibre Co., 71 N. H. 332	540, 543
Rhorer v. Brockhage, 86 Mo. 544	300
Rich v. Downs, 81 Kan. 43	15
Richardson v. Agr. & Mec. Assn., 156 Mo. 412	94
Ricks v. Railway Co., 118 Ga. 259	524
Ridenhour v. Railway Co., 102 Mo. 270	530
Ridgway v. Ludlow, 58 Ind. 248	129
Riggs v. Owen, 120 Mo. 176	258, 260
Roach v. Coffey, 73 Cal. 281	609
Roanoke Inv. Co. v. Railroad, 108 Mo. 64	450
Rogers v. Hanson & Co., 35 Iowa, 283	538, 539
Rogers v. Wolfe, 104 Mo. 10	499
Rogers Park Water Co. v. Fergus, 180 U. S. 624	207
Rosenwald v. Middlebrook, 188 Mo. 93	499
Rosman v. Travelers' Ins. Co., 96 Atl. (Md.) 875	315
Ross v. Board of Supervisors, 1 L. R. A. (N. S.) 437	164
Ross v. Gates, 183 Mo. 347, 117 Mo. App. 243	464
Ross v. Kiger, 26 S. E. (W. Va.) 193	399
Rothan v. Railway, 113 Mo. 143	173
Rozelle v. Harmon, 103 Mo. 339, 12 L. R. A. 187	608
Ruggles v. Illinois, 108 U. S. 526	563, 571
Ruggles v. People, 91 Ill. 256	563, 571
Rumsey v. Peoples Railway Co., 154 Mo. 215	406
Russell v. Farley, 105 U. S. 445	35
Russell v. Shurtleff, 28 Colo. 414	375
Ryan v. Carr, 46 Mo. 486	65
Ryan v. Keane, 211 Mass. 543	681

S

St. Francis Mill Co. v. Sugg, 142 Mo. 364	94
St. Louis v. Annex Realty Co., 175 Mo. 63	513
St. Louis v. Brinkwirth, 204 Mo. 280	514
St. Louis v. Butler, 201 Mo. 396	494
St. Louis v. DeLassus, 205 Mo. 585	512
St. Louis v. Dorr, 145 Mo. 466	513
St. Louis v. Klausmeier, 213 Mo. 119	187
St. Louis v. Liessing, 190 Mo. 480	512
St. Louis v. Realty Co., 259 Mo. 126	669
St. Louis Gaslight Co. v. St. Louis, 46 Mo. 121	208
St. Paul Gaslight Co. v. St. Paul, 181 U. S. 149	209
Sanderson v. Texarkana, 103 Ark. 529	669
Saratoga Springs v. Saratoga Gas Co., 18 L. R. A. (N. S.) 713	578

Saratoga Springs v. Saratoga Light & Power Co., 191 N. Y. 123, 83 N. E. 693	563, 578
Schanewerk v. Hoherecht, 117 Mo. 31	405
Schepers v. Railroad, 126 Mo. 676	524, 525
Schmidt v. Hess, 60 Mo. 591	397
Schmidt v. Sup. Ct. U. O. F., 259 Mo. 491	696
Schreiber v. Sharpless, 110 U. S. 76	607
Schulz v. Railway, 57 Minn. 273	485
Shacklett v. Cummins, 178 Mo. App. 309	497
Sheehan v. Owen, 82 Mo. 465	456
Shepard v. Mo. Pac. Ry. Co., 85 Mo. 629	545
Shohoney v. Railroad, 231 Mo. 131	627
Sidekum v. Railroad, 93 Mo. 400	545
Siemers v. Schrader, 88 Mo. 23	405
Silvester v. St. Louis, 164 Mo. 601	464
Simmons v. Headlee, 94 Mo. 482	499
Simpson v. Scroggins, 182 Mo. 560	299, 300
Smith v. Bell, 6 Pet. 68	395
Smith v. Catlin Land & Imp. Co., 117 Mo. 444	386
Smith v. First Presbyterian Church, 26 N. J. Eq. 132	399
Smith v. St. Paul City Ry. Co., 32 Minn. 1	532
Smith v. State, 142 Ind. 293	485
Smith v. Steel, 81 Mo. 455	516
Solomon v. Manhattan Ry. Co., 103 N. Y. 437	526
Sotham v. Telegram Co., 239 Mo. 619	335
South Chicago City Ry. Co. v. Dufresne, 200 Ill. 456	528
Southern Ind. Ry. v. Railroad Commission, 172 Ind. 113	563, 564
Southern Railway Co. v. Greene, 216 U. S. 400	31
Spencer v. Merchant, 125 U. S. 345	164
Spurlock v. Railroad, 76 Mo. 67	216
Squaw Creek Dr. Dist. v. Turney, 235 Mo. 95	174
Stanley v. Schwalby, 162 U. S. 255	15
Stark v. Kirchgraber, 186 Mo. 642	244
Starks v. Manufacturing Co., 182 Mo. App. 241	497, 499
State v. Bockstruck, 135 Mo. 356	696
State v. Campbell, 214 Mo. 364	696
State v. Connor, 74 Kan. 898	485
State v. Draughn, 140 Mo. App. 263	628
State v. Duestrow, 137 Mo. 44	628
State v. Evertz, 190 S. W. 287	696
State v. Fawcett, 212 Mo. 729	442
State v. Gamble, 108 Mo. 500	258
State v. Gordon, 196 Mo. 185	259
State v. Hancock, 148 Mo. 488	539
State v. Hays, 78 Mo. 600	236
State v. Headrick, 149 Mo. 403	144
State v. Leatherman, 38 Ark. 81	286
State v. McCarver, 194 Mo. 717	260
State v. Newcomb, 220 Mo. 63	389
State v. Railroad, 22 Neb. 313, 23 Neb. 117	564, 571
State v. Railroad, 38 Minn. 281	571
State v. Railroad, 47 So. 969	563
State v. Railroad, 56 Fla. 617	564, 581
State v. Railroad, 100 Minn. 477	581
State v. Railroad, 130 Minn. 144	27, 28
State v. Railroad, 262 Mo. 522	560
State v. Railroad, 265 Mo. 646	89
State v. Rogers, 253 Mo. 399	690
State v. Rosenberger, 212 Mo. 648	109
State v. Ulrich, 110 Mo. 350	258
State v. Wild, 190 S. W. 273	696
State v. Wilson, 265 Mo. 1	438

State ex inf. v. Herring, 208 Mo. 708	189, 190, 192
State ex inf. v. Koeln, 192 S. W. 748	601
State ex inf. v. Light & Development Co., 246 Mo. 618	449
State ex inf. v. Railroad, 176 Mo. 687	21
State ex inf. v. Southern, 265 Mo. 286	458
State ex inf. v. Standard Oil Co., 218 Mo. 355	191
State ex inf. v. West End Light & Power Co., 246 Mo. 653	449
State ex rel. v. Alt, 224 Mo. 493	45
State ex rel. v. Associated Press, 159 Mo. 410	449
State ex rel. v. Bates, 235 Mo. 262	478
State ex rel. v. Board of County Commrs., 87 Minn. 336	165
State ex rel. v. Burton, 266 Mo. 711	269
State ex rel. v. County Court, 142 Mo. 575	672
State ex rel. v. Eicher, 178 S. W. 173	174
State ex rel. v. Ellison, 269 Mo. 410	48
State ex rel. v. Ellison, 176 S. W. 13	654
State ex rel. v. Everett, 245 Mo. 706	87
State ex rel. v. Field, 99 Mo. 356	513
State ex rel. v. Finn, 8 Mo. App. 348	189
State ex rel. v. Flick, 179 Mo. App. 236	261
State ex rel. v. Fry, 186 Mo. 198	691
State ex rel. v. Geiger, 246 Mo. 74	202, 209, 210, 211
State ex rel. v. Gill, 190 Mo. 79	687
State ex rel. v. Graves, 268 Mo. 100	386
State ex rel. v. Gordon, 268 Mo. 713, 188 S. W. 160	666, 671, 673
State ex rel. v. Griffey, 5 Neb. 166	348
State ex rel. v. Hitchcock, 241 Mo. 433	438, 439
State ex rel. v. Hopkins, 87 Mo. 519	344
State ex rel. v. Hough, 193 Mo. 615	173, 224
State ex rel. v. Johnson, 61 Kan. 803	563
State ex rel. v. Johnston, 234 Mo. 338	30
State ex rel. v. Lounsberry, 125 Mo. 157	154
State ex rel. v. McQuillin, 246 Mo. 691	604
State ex rel. v. Mason, 153 Mo. 23	188
State ex rel. v. Mason, 4 Mo. App. 379	189
State ex rel. v. People's Ice Co., 246 Mo. 168	387
State ex rel. v. Perkins, 139 Mo. 117	94
State ex rel. v. Probate Court, 112 Minn. 279	364
State ex rel. v. Pub. Serv. Comm., 259 Mo. 728	560, 562, 564, 567, 568, 583
State ex rel. v. Railroad, 38 Minn. 281	564, 571, 581, 583
State ex rel. v. Railroad, 76 Kan. 467	564
State ex rel. v. Railroad, 85 S. E. 716	572
State ex rel. v. Railroad, 117 Mo. 11	187
State ex rel. v. Railroad, 140 Mo. 552	450
State ex rel. v. Railroad, 240 Mo. 50	108
State ex rel. v. Railroad, 251 Mo. 146	440
State ex rel. v. Railroad Com., 52 Wash. 33	574, 575, 579
State ex rel. v. Riley, 203 Mo. 175	173
State ex rel. v. Roach, 269 Mo. 500	189
State ex rel. v. Slover, 126 Mo. 652	345
State ex rel. v. Slover, 134 Mo. 15	173
State ex rel. v. Smith, 104 Mo. 667	224, 225
State ex rel. v. Spencer, 166 Mo. 285	173
State ex rel. v. Superior Court of King County, 67 Wash. 37	574
State ex rel. v. Switzer, 143 Mo. 287	362
State ex rel. v. Taylor, 224 Mo. 393	131, 168
State ex rel. v. Telephone Co., 189 Mo. 83	445
State ex rel. v. Turner, 177 Mo. App. 464	56, 57
State ex rel. v. Walsh, 69 Mo. 408	189
State ex rel. v. Watson, 71 Mo. 470	189
State ex rel. v. Westport, 116 Mo. 582	286

State ex rel. v. Williams, 221 Mo. 227	35
State ex rel. v. Wilson, 216 Mo. 282	478
State ex rel. v. Woolfolk, 269 Mo. 389	110, 112
State ex rel. v. Young, 255 Mo. 635	478
Staudé v. Tscharner, 187 Ill. 19	607
Stillwell v. Patton, 108 Mo. 360	248
Stone v. Farmers' Loan & Trust Co., 116 U. S. 407	563, 582, 583
Stone v. Insurance Co., 78 Mo. 655	237
Stone v. Railroad, 62 Miss. 607	563
Stone v. Wisconsin, 94 U. S. 181	564
Stoner v. Royar, 200 Mo. 444	129, 130
Storrs v. St. Luke's Hospital, 75 Ill. App. 152	610
Storrs v. St. Luke's Hospital, 180 Ill. 368	607
Stowe v. Stowe, 140 Mo. 604	608
Sullivan v. Nicoulin, 113 Iowa, 76	540
Sutter v. City of New York, 85 N. Y. S. 989	538
Swearengin v. Stafford, 188 S. W. (Mo.) 97	499

T

Taylor v. Von Schraeder, 107 Mo. 228	499
Teckenbrock v. McLaughlin, 246 Mo. 719	604, 608
Term. Ice & Power Co. v. Security Ins. Co., 187 S. W. 564	48
Thornburgh v. Savage Min. Co., 7 Morrison's Min. Rep. 687	542
Tilley v. Railroad, 5 Fed. 641	563, 571, 576
Titus v. Development Co., 264 Mo. 240, 174 S. W. 435	113
Tobin v. Railroad, 211 Pa. St. 457	524
Toler v. Edwards, 249 Mo. 167	244
Towers v. United Rys. & Elec. Co., 95 Atl. (Md.) 170	442
Trebbe v. American Steel Foundries, 185 S. W. 182	95, 99
Truchon v. Mackey, 171 Mo. App. 42	407
Tullock v. Mulvane, 184 U. S. 497	35
Turner v. Shaw, 96 Mo. 22	243

U

Union Pacific Ry. v. Goodridge, 149 U. S. 680	641
United States v. Grimaud, 220 U. S. 520	583
United States v. Perkins, 163 U. S. 625	608
United States v. Union Stock Yard, 226 U. S. 286	639, 641
U. S. Casualty Co. v. Kacer, 169 Mo. 313	315

V

Van Nostrand v. Board of Domestic Missions, 59 N. J. Eq. 19	399
--	-----

W

Wabash Ry. Co. v. Sloop, 200 Mo. 198	644
Wadley Southern Ry. v. Georgia, 235 U. S. 651	27, 31
Wanek v. City of Winona, 78 Minn. 98	541
Ward v. Mo. Pac. Ry. Co., 158 Mo. 226	644
Warren v. Castello, 109 Mo. 342	499
Watson v. Alderson, 146 Mo. 343	604
Wayman v. Southard, 10 Wheat. 1	564
Webber v. Boom Co., 62 Mich. 626	130
Weber v. Railroad, 104 La. 367	524
Western Tie & Timber Co. v. Naylor Dr. Dist., 226 Mo. 420	168
Western Union Tel. Co. v. Kansas, 216 U. S. 1	31
Whittelsey v. Kellogg, 28 Mo. 404	386
Wight v. United States, 167 U. S. 517	641
Willis v. Railroad, 122 N. C. 909	484
Wilson v. Collins, 109 N. Y. S. 660	538
Wilson v. Lucas, 43 Mo 290	223

Wilson v. Railroad, 108 Mo. 594	226
Winsor Coal Co. v. Railroad, 52 Fed. 716	27, 28
Winter v. Spradling, 163 Mo. App. 77	497, 498
Woolfolk v. Tate, 25 Mo. 597	260
Wright v. Great Northern Ry. Co., 186 S. W. (Mo. App.) 1088	335
Wyatt v. Railway Co., 62 Mo. 408	527

Y

Yost v. Railroad, 245 Mo. 244	95, 98
Young v. Railroad, 33 Mo. 509	27
Young v. Railroad, 227 Mo. 307	76, 423, 424, 428

CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI

AT THE
OCTOBER TERM, 1916.

(Continued from Volume 269.)

JOHN ARTHUR FLOURNOY et al., Appellants, v.
JOSEPHINE KIRKMAN et al.

Division Two, February 2, 1917.

PARTITION: Subject to Life Estate: Agreement Not to Divide. Where three daughters to whom a mother conveyed land subject to a life estate reserved for herself, at her request, entered into a written agreement not to "ask for a division or partition," the agreement "to continue in force and be binding on each party hereto while they live," the heirs of one of the daughters who has died are entitled to have partition, subject to the life estate of the mother. The agreement should not, without good reason, be construed to bind the survivors to continue the cotenancy with the heirs of the deceased.

Appeal from Buchanan Circuit Court.—*Hon. Wm. D. Rusk*, Judge.

REVERSED AND REMANDED.

Randolph & Randolph and *W. B. Norris* for appellants.

(1) The writing in question, if otherwise valid, would be an unreasonable restraint upon the alienation as well as the enjoyment of the property. *Hauessler v. Iron Co.*, 110 Mo. 188. It is an unreasonable restraint on alienation because purchasers are less liable to purchase an undivided interest in a tract of land than they are to purchase the entire interest in even a smaller tract. It is a restraint upon enjoyment because unfriendly co-

270 Mo.]

(1)

tenants never get the best results out of their common property. (2) The writing in question is not a covenant running with the land. It can under no construction be anything more than a personal and collateral covenant. *Sturgeon v. Schaumbury*, 40 Mo. 486.

O. D. McDaniel for respondents.

ROY, C.—This is a suit to partition 216.77 acres of land near St. Joseph. There was a finding and judgment for the defendants, and the plaintiffs have appealed.

On August 25, 1902, Martha A. Gann, one of the defendants, owned the land in fee simple. On that day, by a general warranty deed in which she reserved to herself a life estate in the land, she conveyed the remainder subject to such life estate to her three daughters, Josephine Gann, Victoria Crumpley and Julia M. Flournoy, then the wife of the plaintiff John A. Flournoy.

At the time of the execution of that deed the three daughters and John A. Flournoy entered into a mutual contract in writing, which, except the signatures, is as follows:

“We, Josephine Gann and Victoria Crumpley and Julia Flournoy and John A. Flournoy hereby agree on the request of Martha A. Gann that they will not ask for a division or partition of the lands deeded to Josephine Gann and Victoria Crumpley and Julia Flournoy by Martha A. Gann on August 25, 1902, it being the old home place at Matney Station. And this agreement is to continue in force and to be binding on each party hereto while they live, but any party has the right to go and live in the rooms reserved in the old homestead at Matney Station. This agreement is made and signed as being the will of Martha A. Gann and each undersigned herein binds themselves to live up to it. But each party is to receive an equal part of all rents collected and pay an equal part of all expenses incurred and improvements made and the girls herein are to pay an equal part of Martha A. Gann’s funeral expenses.”

Julia M. Flournoy died October 6, 1906, leaving three children born of her marriage with John A. Flour-

Flournoy v. Kirkman.

ney, viz., Martha V., Midia Josephine, and Samuel G. The last named died on June 8, 1910, without having been married. Midia J. was born August 22, 1898, and was a minor at the institution of this suit.

After the death of his first wife John A. Flournoy married her sister, Victoria Crumpley. Josephine Gann married one Kirkman. The petition makes Mrs. Kirkman and Mrs. Gann defendants. All the other parties in interest are made plaintiffs. The interests of the various parties are correctly stated, it being alleged that Mrs. Gann owns a life estate in the land, that defendant Mrs. Kirkman and plaintiff Mrs. Flournoy each own a third subject to such life estate, and that the other plaintiffs own a third subject to said life estate, their respective several interests in that third being stated in the petition.

There is a prayer for partition in kind without requesting that it be made subject to the life estate of Mrs. Gann.

The answer admits that the interests of the parties are correctly stated in the petition. It then alleged the making of said contract, and pleads that the plaintiffs are thereby estopped to have partition.

The reply denies that there is such an estoppel.

In *Haeussler v. Missouri Iron Co.*, 110 Mo. 188, this court cited the following from the civil law: "It is always free for every one of those who have anything in common among them to divide it; and, although they may agree to put off the partition to a certain time, yet they can make no such agreement as never to come to a partition. For it would be contrary to good manners that the proprietors be forced to have always an occasion of falling out, by reason of the undivided possession of a common thing."

It was also said in that case: "The right of partition is an absolute right which yields to no consideration of hardship or inconvenience. [Freeman on Cotenancy & Partition, sec. 443.] Anything that militates against this right is repugnant to the essential characteristics of cotenancy. [Mitchell v. Starbuck, 10 Mass. 11.] And the

tendency of our times is to greater freedom of sale and transfer of property unfettered by conditions or limitation of the right of alienation."

The contract read in evidence assumed that the daughters would all survive the mother. The provisions that they shall share equally in the rents, and that any party can live in the rooms of the old homestead, clearly refer to the time after their mother's death, for the mother alone is entitled to the possession and rents during her life. That contract provides that the girls are to pay an equal part of the mother's funeral expenses. It says: "And this agreement is to continue in force, and to be binding on each party hereto while they live." We look in vain for any indication in that contract of an intention that it shall bind the interests of the parties after their respective deaths.

The authorities above cited show that it is not the policy of the law to keep uncongenial cotenants yoked together. It may very well be that three sisters, cotenants, may bind themselves not to partition while they all live. It may be that they can agree that there shall be no partition while any one of them lives. We are not now deciding those points. We simply hold that where the cotenants agree, as here, to take each other "for better, for worse" as cotenants, that agreement should not, without good reason therefor, be construed to go further and bind the survivors to continue such relation with the heirs of the deceased, and we hold that no such good reason exists in this case.

We feel constrained to say that there does not appear any reason why the defendant Martha A. Gann should be made a party defendant herein. She is not a cotenant with the other parties. They are permitted to make partition, but it must be subject to her life estate. [Hayes v. McReynolds, 144 Mo. 348.]

The judgment is reversed and the cause remanded.
White, C., not sitting.

PER CURIAM:—The foregoing opinion of Roy, C., is adopted as the opinion of the court. All of the judges concur.

**EDWIN S. MARSTON, Appellant, v. JOHN M. CAT-
TERLIN et al; JOSEPH HODNETT, Appellant.**

Division Two, February 2, 1917.

1. **PRAYER AND RELIEF:** Land on an Accounting. A supplemental bill whereby plaintiff seeks to have vested in him the title of certain land, which has been conveyed since suit was begun, and in which he prays that, if the court should find that the present record owner is a purchaser in good faith and for value, so that the plaintiff shall have no right of redemption against him, the original defendant shall be decreed to account for and pay over to plaintiff the proceeds of the property so conveyed by him since the filing of the original petition, is sufficient to entitle plaintiff to an accounting for the proceeds in the event the court could not give him the land.
2. **OUTSTANDING EQUITIES: Notice: Payment of Existing Mortgages.** The payment in full by the subsequent grantee of existing mortgages held by his grantor is convincing proof that the grantee did not have actual notice of a prior outstanding claim in favor of plaintiff brought about by said grantor.
3. ———: **Constructive Notice: Special Warranty Deed.** A purchaser by general warranty, in whose chain of title is a remote recorded deed which in effect is nothing more than a quit-claim with a special warranty covenanting against any one who might claim under the grantor therein, is not thereby, being without actual notice, chargeable with constructive knowledge of outstanding equities existing at the time the special warranty was made.
4. ———: ———: ———: **Grantee Under Quit-Claim.** A subsequent grantee in a general warranty deed is not prevented from occupying the position of a bona-fide purchaser, without notice, merely because some prior conveyance in his chain of title is a quit-claim or special warranty deed. In such case the general rule applicable to the grantee in a quit-claim deed, should not be applied to a grantee in a subsequent warranty deed. [Distinguishing *Mason v. Black*, 87 Mo. 329, and *Freeman v. Moffitt*, 119 Mo. 280.]

Appeal from Bates Circuit Court.—*Hon. C. A. Calvird*,
Judge.

REVERSED AND REMANDED (*with directions.*)

Thomas J. Smith, Bowersock, Hall & Hook and Robert B. Fizzell for appellant Marston.

(1) When the defendant Catterlin acquired the Bates County land by purchase under the foreclosure of the Kerns deed of trust, he became a constructive trustee thereof and held the property for the plaintiff. *Marston v. Catterlin*, 239 Mo. 390; *Eoff v. Irvine*, 108 Mo. 383; *Cameron v. Lewis*, 56 Miss. 82; *Winn v. Dillon*, 27 Miss. 496; *Olson v. Lamb*, 56 Neb. 104; *Galbraith v. Elder*, 8 Watts (Pa.), 81; *Henry v. Raiman*, 25 Pa. St., 354; *Smith v. Brotherline*, 62 Pa. St. 461; *Ainsworth v. Harding*, 22 Idaho, 645; *Davis v. Smith*, 43 Vt. 269; 39 Cyc. 172. (2) When the defendant Catterlin disposed of the Bates County land, he became liable to account to the plaintiff for all of the proceeds of the transaction received by him. 4 *Sedgwick on Damages* (9 Ed.), sec. 1256h; *Perry on Trusts and Trustees* (6 Ed.), secs. 429, 430, 844; *Pettit v. Carpenter*, 86 Mo. App. 452; *Whittle v. Vanderbilt M. & M. Co.*, 83 Fed. 48; *Linnell v. Lyford*, 72 Me. 280; *Cheshire v. Cheshire*, 37 N. C. 569. There is no distinction between express and constructive trustees in this regard. *Cheshire v. Cheshire*, 37 N. C. 569; *Clapp v. Vatcher*, 9 Cal. App. 462; *Pettit v. Carpenter*, 86 Mo. App. 452. (3) The right of the plaintiff to compel the defendant Catterlin to account for the proceeds of his sale of the Bates County land does not depend upon whether or not the defendant Hodnett purchased the land with notice of the present litigation. The plaintiff may elect to hold the defendant Catterlin to account. *Oliver v. Pratt*, 3 How. (U. S.) 401; *Parker v. Straat*, 39 Mo. App. 626. (4) No notice of *lis pendens* having been filed before the defendant Hodnett purchased the Bates County land from the record owner, Hodnett did not have constructive notice of this litigation. Sec. 8211, R. S. 1909; *Steele v. Robertson*, 75 Ark. 228; *Pennington v. Martin*, 146 Ind. 635; *Trapp v. Bailey*, 152 Ky. 369; *Perkins v. Ogilvie*, 140 Ky. 412; *White v. Manning*, 26 Ky. L. Rep. 887; *St. Ry. Co. v. Detroit*, 124 Mich. 449; *McKenzie v. Fellows*, 97 Miss. 31; *Gilman v. Carpenter*, 22 S. D. 23; *Easley v. Barksdale*, 75 Va. 274; *DeCamp v. Carnahan*, 26

W. Va. 839; Smith v. Gale, 144 U. S. 509; Glass v. Stark, 156 Wis. 21.

C. A. Denton for appellant Hodnett.

(1) The record title that defendant Hodnett purchased under was a complete chain, each link of which was in effect a warranty deed. The deed from Catterlin to Lyons dated September 3, 1904, and recorded the same day, as shown by the record, contained in the granting clause the words "grant, bargain and sell, convey and confirm." There were no words in the *habendum* clause specifically limiting the said words in the granting clause. Therefore it was a warranty deed and imparted no notice of any equitable defects not of record, that might be against the title to the land involved in this suit. Sec. 2793, R. S. 1909; Tracy v. Greffett, 54 Mo. App. 564; Alexander v. Schreiber, 10 Mo. 460; Collider v. Gambles, 10 Mo. 471; Miller v. Bayless, 101 Mo. App. 487, 194 Mo. 630. (2) Defendant Hodnett had a right to rely upon the covenants of general warranty in the deed from Catterlin to Lyons, as shown by the record in the office of the Recorder of Deeds. Therefore, although the words "grant, bargain and sell, convey and confirm" in the said deed as copied were not in the original deed, having been by mistake so copied on the records, Hodnett had the right to rely upon the records regardless of whether it was a true copy of the original. Terrell v. Andrew County, 44 Mo. 312; White v. Lumber Co., 240 Mo. 13; Ritchie v. Griffith, 12 L. R. A. 384, 22 Am. St. 155; Troyer v. Wood, 96 Mo. 478. (3) The only equitable rights that existed in favor of the plaintiff as found by this court when this case was here before that estopped Catterlin from holding the title to the land in question arose out of Catterlin's acts. In the so called special warranty deed of Catterlin to Lyons, even though it should be held that defendant Hodnett took his title under the conditions of the said deed regardless of the copy as recorded, Catterlin covenanted and warranted against his acts, as will be noted on an examination of the *habendum* clause. Duffy v. Sharp, 73 Mo. App. 316; 11 Cyc. 1070; Oak Dale v. Fagen, 63 N.

W. 456; Jenks v. Ward, 45 Mass. 404; Mitchell v. Warner, 5 Conn. 527.

Silvers & Silvers for respondent.

(1) Plaintiff Marston sued for the land; and cannot recover its value, or the proceeds thereof. 15 Cyc. 262; McMurray v. St. Louis, 138 Mo. 618; Nanson v. Jacob, 93 Mo. 346; Donnelly v. Trust Co., 339 Mo. 370; Hector v. Mann, 225 Mo. 248. (2) Where, as in this case, plaintiff could elect as to remedies, and sue either, (a) for the land, (b) for its value, or (c) for the proceeds arising from its sale, he is bound by his election when he sued for the land itself. Nanson v. Jacobs, 93 Mo. 346. (3) Plaintiff having sued for the land and recovered judgment therefor, has no just cause for appeal. He only asked for the value of the land, in case the court found that it has been placed beyond his reach. (4) Hodnett is in privity with Catterlin as to the land in controversy, claiming through him, and is bound by the judgment of this court which fixed Catterlin's interest in this land. Cooley v. Warren, 53 Mo. 169; Perkins v. Goddin, 11 Mo. App. 443; Henry v. Woods, 77 Mo. 277; Carthage v. Wesner, 116 Mo. App. 121; Mason v. Summers, 124 Mo. App. 174; Litchfield v. Goodnow, 123 U. S. 549; 24 Am. & Eng. Ency. Law, p. 746; Greenleaf, Ev., 523. (5) Catterlin having only a part interest in the land in controversy, he could convey only what he had, and Hodnett could and did get through mesne conveyances from Catterlin only this part interest. Ridgeway v. Holaday, 59 Mo. 455; Bogy v. Shoab, 13 Mo. 380; Craig v. Zimmerman, 87 Mo. 475. (6) The deed from Catterlin to Lyons, was a special warranty, and equivalent to a quitclaim deed only. Mann v. Best, 62 Mo. 497; Oliver v. Pyatt, 3 How. 333; Brown v. Jackson, 3 How. 449; Freeman v. Moffitt, 119 Mo. 306. (7) Hodnett is charged with notice of everything recited in the deeds in his chain of title. Freeman v. Moffitt, 119 Mo. 280. (8) Hodnett who claims under or through quit claim deeds held his interest subject to the equities in favor of Marston, Marston's equities in the land not being subject to registration under our law pertaining to the registration of conveyances.

Marston v. Catterlin.

Hendrick v. Calloway, 211 Mo. 563. (9) Hodnett having bought property in litigation at the time of his purchase, takes subject to the result of such litigation. 25 Cyc. 1450; Tice v. Hamilton, 188 Mo. 302; Carr v. Gates, 96 Mo. 274; Parker-Washington Co. v. Clinton, 155 Mo. App. 386. (10) There appeared also in the record of title a recitation that the trust deed given to the New England Loan & Trust Company was a first lien on the property. This was notice to Hodnett, and taken with the circumstance that this \$1950 trust deed had been foreclosed and the land sold to Marston was sufficient notice to Hodnett to put him on enquiry. Hodnett who traded for the Catterlin interest, had an abstract disclosing to him the seven quit-claim deeds in his chain of title, and the special warranty deed shown on the abstract. This last deed was sufficient to put a reasonable man on guard. And more especially an attorney who knows the significance of such an instrument.

WILLIAMS, J.—This is a proceeding by a supplemental bill to have the title to certain land decreed to be in the plaintiff or, if the land should be found to be beyond the reach of the court, then to have the defendant Catterlin account to the plaintiff for the proceeds of the sale of said land. This is the second appeal in the case. The first appeal is reported in the 239th Missouri Report, at page 390. The opinion in that case should be read in connection with this opinion in order to have a correct understanding of the facts. Upon the first appeal, this court reversed the judgment of the trial court and held that the plaintiff should be vested with the title to the real estate in question. Defendant Hodnett was not a party to the original suit. Before final judgment was had upon the first trial, in the trial court, defendant Catterlin conveyed the land in suit, and when the mandate was returned to the trial court this supplemental bill was filed by plaintiff which brought in Joseph Hodnett as an additional defendant. Hodnett was the record owner of the land.

Trial was had in the circuit court of Bates County. The trial court denied plaintiff's right to recover from Catterlin the proceeds of the sale of said land by him, but

found that plaintiff was entitled to recover the land from defendant Hodnett, upon the payment to said Hodnett of the sum of \$348.10. From this judgment both the plaintiff and defendant Hodnett duly perfected an appeal to this court.

The supplemental petition, after stating the facts embraced in the first appeal, alleges that after the filing of the original petition and on the third day of September, 1904, defendant Catterlin conveyed the land to Lyman Lyons and that on the same day said Lyons conveyed the premises to Ray Wolfe; that on November 18, 1904, said Wolfe conveyed said premises to Ralph Earhart; that on January 23, 1905, said Earhart conveyed said premises to defendant Joseph Hodnett; that all of said conveyances were without consideration and did not represent bona-fide transactions between the parties, and that the grantees purchased with full notice of the claim of plaintiff, as set up in his original petition in this action. The prayer of the petition asks that all of the said conveyances be canceled and that the title to said real estate be vested and quieted in the plaintiff. The following was also a part of the prayer: "That if upon final hearing of the cause, the court shall find that the defendant Hodnett is a purchaser in good faith and for value of said property so that the said plaintiff shall have no right of redemption against him, said defendant Catterlin shall be decreed to account for and pay over to the plaintiff the proceeds of the said property so conveyed by him since the filing of the original petition herein, in addition to the rents and profits from said property." This was followed by a plea for general relief.

The separate answer of defendant Hodnett stated that he purchased the property in January, 1905, for a valuable consideration, from one Earhart, the record owner thereof. Said separate answer also contained a general denial of the allegations of the supplemental bill.

The separate answer of defendant Catterlin pleads the judgment of the Supreme Court on the former appeal in this case, wherein it was held that plaintiff was entitled to the land upon paying said Catterlin said redemption

Marston v. Catterlin.

money. The separate answer further alleges that Catterlin has sold all his right, title and interest in said land and now has no further interest therein except certain deed of trust liens thereon given him by purchasers of the land. He prays that the court ascertain the amount of money which the plaintiff ought to pay under the former ruling of the Supreme Court and asks that he have judgment for that amount against the plaintiff.

The evidence tends to show that on September 3, 1904, and while this suit was pending on the original petition, in the circuit court of Bates County, the defendant Catterlin conveyed the land in suit, by special warranty deed, to one Lyons. However, this deed from Catterlin to Lyons, as recorded by the Recorder of Deeds, appears upon the records in the Recorder's office, in effect at least, as a general warranty deed. Thereafter, and on the same day, said Lyons executed a deed of trust on said land to secure a note for twelve hundred dollars, payable to said Catterlin, and, thereafter, and on the same day, by warranty deed, conveyed the property to one Wolfe. It appears that neither Lyons nor Wolfe paid anything for this property, but acted merely as accommodation holders of the title for said Catterlin. On November 18, 1904, said Wolfe, by warranty deed, conveyed the land to one Earhart, subject to this deed of trust for twelve hundred dollars. On November 25, 1904, said Earhart executed a second deed of trust on said land to secure a note for \$250, payable to said Catterlin. There was some evidence tending to show that the deal with Earhart was between defendant Catterlin and Earhart and that in exchange for the land involved in this suit, which was then owned by Catterlin, Earhart, through mesne conveyances, conveyed to defendant Catterlin, three and one-half acres of land in Jackson County, Missouri, which was then subject to a deed of trust for \$1670. On January 23, 1905, said Earhart conveyed, by warranty deed, the land involved in this suit to defendant Hodnett, who was then an attorney of Illinois and who had gone to Kansas City for the purpose of selling some oil stock then owned by him. The trade between Hodnett and Earhart was negotiated by Mr. C. B. Rhodes, a real es-

tate dealer of Kansas City. Defendant Hodnett gave one hundred dollars in cash and seven thousand shares of the Hudson Oil and Gas Company stock for the land. There is some evidence that the oil stock proved, afterwards, to be valueless. Defendant Hodnett testified that the oil stock was then worth about thirty cents a share and he considered that he was paying about four thousand dollars for the land involved in this suit. Defendant Hodnett admitted that he examined an abstract of title to this land. On the abstract sheet showing the deed from Catterlin to Lyons the words "special warranty deed" were written. No other or further words describing or defining the deed were used in the abstract. It also appears from the evidence that defendant Hodnett, before he purchased the land from Earhart, talked with defendant Catterlin over a long-distance telephone line from Kansas City to Butler. The witnesses disagree as to what was said in this talk over the telephone. Defendant Catterlin testified that Hodnett asked him why he gave a special warranty deed, and that he replied that the land was in litigation and that the sale under the deed of trust was being questioned. Hodnett testified that he talked to Catterlin to inquire about the character of the land and about the title in general and that Catterlin told him over the 'phone that the title was good. Defendant Hodnett testified that he had no information concerning this litigation at the time that he bought the land. After buying the land he paid to defendant Catterlin the sum of \$1920.80. This was the amount of the two mortgages against the property plus interest. This was not all paid at one time, but was paid at several different times until both mortgages were finally paid. It is admitted that no notice of *lis pendens* was ever filed in the cause until 1912, which was long after these conveyances were made. Defendant Catterlin offered evidence showing that the present value of the land was between three and eight dollars an acre; and that the land was less valuable now than when this litigation was first started, due to drainage conditions and overflows on the land.

Both appellant Marston and appellant Hodnett contend that Hodnett purchased the property in good faith

Marston v. Catterlin.

and without notice of the outstanding equity of the plaintiff and that therefore the court erred in decreeing the title out of Hodnett and vesting it in the plaintiff subject to the payment of the redemption money.

Appellant Marston further contends that the court erred in not permitting him to have an accounting against Catterlin for the proceeds received by Catterlin from the sale of the land.

Respondent contends (1) that plaintiff, had he so elected in the first instance, might have recovered against him for the preceeds, yet since he sued to recover the land if such relief were within the power of the court, he thereby elected to pursue that remedy and cannot now complain of the court's action in granting him relief for which he prayed; (2) that Hodnett purchased the property charged with notice of the plaintiff's equity in the land by reason of the fact that Catterlin conveyed the property by special warranty deed.

I. We are of the opinion that plaintiff's supplemental petition is sufficient to entitle him to an accounting for the proceeds in the event it should be found that the court **Relief** could not give him the land. If, on the other hand, the facts should be found sufficient to justify the court's action in vesting the title to the land in plaintiff, then plaintiff should not be now heard to complain, because it would be the exact relief for which his petition prays.

It, therefore, becomes important to first determine whether the court erred in divesting defendant Hodnett of the title.

We do not believe there is sufficient evidence to justify the conclusion that Hodnett had actual notice of plaintiff's claim to this land at the time Hodnett made the purchase. It is true Catterlin testified that he told Hodnett of the pending litigation, before Hodnett bought the land. This is denied by Hodnett. Hodnett's subsequent action in paying Catterlin \$1920 to satisfy the two deeds of trust held by Catterlin against the property is convincing proof, we

**Outstanding
Equities:
Notice.**

think, that Hodnett did not know of the plaintiff's equity at the time of the purchase.

Should it be said that Hodnett is chargeable with constructive knowledge of the outstanding equities? We think not.

It is admitted that statutory notice of *lis pendens* was not filed by plaintiff prior to Hodnett's purchase of the land, so that it cannot be contended that he is chargeable with constructive notice from that source.

The only other source from which constructive notice might come would be from the character of the deed given by Catterlin to Lyons and which lies within Hodnett's chain of title. This deed was in effect nothing more than a quit-claim deed with the special warranty covenanting against anyone who might claim under the grantor.

The general rule in this State is as follows: "A *grantee* in a recorded quit-claim deed for value who has no actual notice holds a good title against a prior unrecorded deed, subject to record, and holds a good title against any equity to which the recording act applies. . . . A quit-claim deed does not bar outstanding equities *not* the subject of record." [Hendricks v. Calloway, 211 Mo. 536, l. c. 563-4, and cases therein cited.]

The same rule is also applicable to a special warranty deed which limits the covenants of warranty against persons claiming to hold under the grantor. [7 R. C. L. 1129; Mann v. Best, 62 Mo. 491, l. c. 497.]

// So far as we are aware the application of the rule in this State has been limited to cases wherein the *grantee* in the quit-claim deed was the person claiming to be the purchaser in good faith. In the case at bar defendant Hodnett holds under a general warranty deed and the two deeds in the chain of title immediately preceding defendant's deed were also warranty deeds. The special warranty deed was therefore remote from the transaction by which Hodnett acquired title. Should the general rule applicable to the *grantee* in a quit-claim deed be applied to a grantee in a subsequent warranty deed?

The great weight of authority upon what appears to us to be the sounder logic is to the effect that a subsequent

grantee in a general warranty deed is not prevented from occupying the position of a bona-fide purchaser, without notice, merely because some prior conveyance in his chain of title is a quit-claim or special warranty deed.

The rule here applicable is correctly and tersely stated in 39 Cyc. 1696 as follows: "Even in those courts in which the rule prevails that one who takes under a quit-claim deed cannot be a bona-fide purchaser, it is limited to the grantee in such a deed, and not extended to those cases in which a quit-claim is only a prior conveyance in the chain of title." To the same effect are the following authorities: *Stanley v. Schwalby*, 162 U. S. 255, l. c. 277; 23 Am. & Eng. Ency. Law, 512; *Otis v. Kennedy*, 107 Mich. 312; *Rich v. Downs*, 81 Kan. 43; *Hannan v. Seidentopf*, 113 Iowa, 658; *Meikel v. Borders*, 129 Ind. 529.

Nothing herein stated conflicts with the decision announced in the case of *Mason v. Black*, 87 Mo. 329, l. c. 342-4. The decision in that case turned upon the proposition that the quit-claim deed, forming a prior link in the chain of title, contained a *peculiar* clause sufficient within itself to put the subsequent purchaser under a warranty deed upon inquiry. The case is therefore clearly distinguishable from the case at bar. Neither does our holding conflict with the case of *Freeman v. Moffitt*, 119 Mo. 280, l. c. 302, cited by respondent. What was said in the *Moffitt* case refers merely to the prior special warranty as one fact to be considered with other circumstances tending to prove notice, and cannot be said to be in any manner an attempt to state a rule that subsequent purchasers could not be bona-fide purchasers merely because a prior quit-claim or special warranty deed appeared in the chain of title.

We do not feel that the facts are sufficiently developed in this record to justify us in attempting to settle the question of accounting between plaintiff and defendant Catterlin, but are of the opinion that that question can be more accurately adjusted by the trial court upon a new trial.

The judgment is reversed and the cause remanded with directions to the trial court to dismiss the bill as to

White v. Delano.

defendant Hodnett, and to proceed with a new trial on the question of an accounting as between the plaintiff and defendant Catterlin. And to this end either party may, if he so desires, so amend the pleadings as to more clearly draw the issue upon that question. All concur.

C. W. WHITE v. F. A. DELANO et al., Receivers of
WABASH RAILROAD COMPANY, Appellants.

In Banc, February 13, 1917.

1. **PENALTY PENDENTE LITE: Violation of Freight Law.** The penalty of treble-damages imposed by the Maximum Freight Rate acts of 1905 for an overcharge by a railroad company for the carriage of commodities was suspended during the pendency of the injunction suit brought by the carrier to enjoin the enforcement of the acts on the ground that the maximum rates fixed by them were confiscatory.
2. ———: ———: **Constitutional Right.** The constitutional right of any person whose property or liberty is affected by a statute to bring a suit to test its validity would be impaired and invaded if the penalties imposed by the statute for its violation could be inflicted upon him for violations of the statute during the pendency of a suit brought in good faith.
3. ———: ———: **Right to Sue: Due Process.** The right to sue and defend in the courts is one of the highest and most essential privileges of citizenship, and a statute which imposes on a citizen penalties for bringing a suit to establish his constitutional rights, or that imposes a penalty for its violation during suit pending, would deny to him due process of law, for it would impair his constitutional right to "certain remedy for every injury to person, property or character."
4. **SUSPENSION OF STATUTE PENDENTE LITE: Overcharge of Freight Rates.** The Maximum Freight-Rate statutes of 1905, held to be invalid by the circuit court, but to be valid upon appeal to the Supreme Court of the United States, were not, as to the freight rates fixed by them nor as to overcharges, suspended during the pendency of the appeal.
5. **DAMNUM ABSQUE INJURIA: Overcharges for Freight Shipment: Result of Suit.** Overcharges for shipments of freight, made by a railroad company in violation of a statute during the time a

White v. Delano.

suit of injunction to test the validity of the statute was pending, wherein the circuit court held the statute invalid and the Supreme Court on appeal held it to be valid, are not *damnum absque injuria*, as flowing directly from the legitimate prosecution of the injunction; but such overcharges paid by the shippers belong to them, and may be recovered by them from the carrier.

6. **OVERCHARGES: Charges Paid Connecting Carrier.** Where the consignees of a freight shipment were not located on defendant's railroad, and a connecting company transported the cars to the consignees, for a consideration charged to and paid by defendant, and by the defendant charged to and paid by the shipper, the defendant has no legal right to surcharge the shipper's account with such connecting charges, but when sued for the overcharges should be required to respond in damages for whatever overcharges it made and collected in excess of the rates fixed by the statutes.

Appeal from Montgomery Circuit Court.—*Hon. James D. Barnett, Judge.*

REVERSED AND REMANDED (*with directions*).

J. L. Minnis, N. S. Brown and H. W. Johnson for appellants.

(1) The demurrer to the evidence should have been sustained, because, (a) The Maximum Freight Rate Act was suspended for the time being, by force of the injunctive decree of the Federal court. *State ex inf. v. Railroad*, 176 Mo. 687; *Young v. Railroad*, 33 Mo. 509; *Coal Co. v. Railroad*, 52 Fed. 716; *State v. Railroad*, 130 Minn. 144; *Wadley Southern Ry. v. Georgia*, 235 U. S. 651; *Coal & Coke Ry. v. Conley*, 67 W. Va. 129, 230 U. S. 522. (b) The alleged damages resulting to plaintiff are *damnum absque injuria*, because they directly flow from the legitimate prosecution of the injunction suit. *Meysenberg v. Schleiper*, 48 Mo. 426; *St. Louis v. Gaslight Co.*, 82 Mo. 349; *State ex rel. v. Williamson*, 221 Mo. 264; *Albers Com. Co. v. Spencer*, 236 Mo. 628; *San Jose Co. v. Cutting*, 133 Cal. 237; *Clay Center v. Williamson*, 79 Kan. 485; *Russell v. Farley*, 105 U. S. 445; *Meyers v. Block*, 120 U. S. 208; *Tulloch v. Mulvane*, 184 U. S. 497; *Railroad v. Elliott*, 184 U. S. 530; *Houghton v. Cortelyou*, 208 U. S. 149; *High on Inj.* (4 Ed.), sec. 1663. (2) The court erred in

giving judgment to plaintiff for treble damages, because, (a) During the time the shipments were made, defendants were in good faith proceeding to test the constitutionality of the Maximum Freight Rate Act, and during such time the penalties provided by said statute could not be constitutionally invoked. Cases under point one, first subdivision. (b) The Maximum Freight Rate Act provided the exclusive penalty for its violation, and the penalty of treble damages provided for by section 3241 cannot be invoked. See Sec. 2, Laws 1907, p. 171. (c) Sec. 3248, R. S. 1909 was repealed by said section 2. See sec. 5, Laws 1907, p. 171. (3) The court's finding of fact on each count of the petition is contrary to the law and the evidence, and the judgment based thereon is excessive, because the court erroneously failed to allow each of the two carriers hauling the shipments, its maximum charges as provided by the Maximum Freight Rate Act. (4) The so-called continuous mileage provision of Sec. 3241, R. S. 1909, is invalid, because: (a) It is in conflict with the preceding parts of the section fixing the reasonable rates to be charged. (b) As applied to the facts in this case, the provision requires one of two things, viz.: (1) That the last carrier shall haul the shipment for nothing; or (2) that the first carrier shall, out of its revenues, pay the reasonable charges of the last carrier, and thereby reduce the revenues of the first carrier below the reasonable rates fixed by the statute. *Owens v. Railroad*, 83 Mo. 454. (c) The provision fixes no basis for dividing the total charges between the carriers involved in the haul, and is so indefinite and uncertain as to be incapable of enforcement, and therefore, void for uncertainty.

Ernest E. Watson, W. P. Alden, Henry L. McCune and Clifford B. Allen, Amici Curiae.

James F. Ball and Claude R. Ball for respondent.

(1) The suspension of the enforcement of the statute could only suspend the enforcement of the law between the parties to that case until the injunction was finally determined, and when the injunction was dissolved

it left the parties just where they were when the suit was begun. (2) If the railroad insisted on retaining the excess so charged, as they do here, the penalty of the statute should be invoked. (3) The statute complained of by the defendants in this cause has been upheld by the appellate courts of this State for a great many years. Burkholder Case, 82 Mo. 572; McGrew v. Railroad, 230 Mo. 496; McGrew v. Railroad, 177 Mo. 533; Cohn v. Railroad, 181 Mo. 30. (4) The overcharge of rate paid by the plaintiff in this case to the defendants was his as much after the payment of the same to the defendants as it was before. (5) The fact that plaintiff did not institute this suit against the defendants during the time the injunction suit was pending is in no way to the disadvantage of these defendants. (6) Such a statute as this enacted under the Constitution for the control of common carriers, or those operating such a system, should be construed in the most beneficial way which its language will permit, so as to prevent common carriers, and those operating the same, from infringing upon the rights of the citizen. McGrew v. Mo. Pac. Ry. Co., 177 Mo. 545; Gott v. Powell, 41 Mo. 417; St. Louis v. Gaslight Co., 70 Mo. 69, 82 Mo. 349. These cases all hold that parties must be restored to their rights at the time of the institution of the injunction. (7) The court's finding of fact on each count of the petition gave credit to the defendants for the legal rate they were entitled to charge the plaintiff for these various shipments from the point of beginning to their destination in the city of St. Louis. The court gave the defendants credit on each shipment for the amount they paid on each shipment to its connecting line, and rendered a judgment against them for the excess in each count.

W. F. Evans, E. T. Miller, J. M. Bryson, J. W. Jamison, Edw. J. White, J. F. Green, Thos. T. Railey and Thomas R. Morrow, Amici Curiae.

WOODSON, J.—This suit was instituted in the circuit court of Montgomery County by the plaintiff against the defendants as receivers of the Wabash Railroad Com-

pany, to recover alleged overcharges in payment of freight collected by them on shipments of live stock, made by plaintiff from Montgomery City, Jonesburg, New Florence and High Hill, Missouri, to the city of St. Louis, Missouri, and consigned to the St. Louis Stock Yards, the St. Louis Dressed Beef Company and the Independent Packing Company. There was a judgment for the plaintiff, and the defendants appealed to this court.

The issues and facts of the case are undisputed, and are as follows, as stated by counsel for defendants:

“The petition is based upon the Maximum Freight Statute of 1907 (Secs. 3241-2, R. S. 1909), and contains one hundred and thirty-nine separate counts, each count covering a separate shipment between the points named. As the allegations in each count are identical, except as to the place of shipment, the freight charges paid, and the amount of the alleged overcharge, it is deemed sufficient to refer to the allegations of the first count.

“The petition charges that ‘the defendants are the duly appointed receivers of the Wabash Railroad Company, and were during all of the times mentioned in the petition, operating the line of the Wabash Railroad as a common carrier of live stock in carload lots, for hire, and for carrying of all other stock usually and customarily carried and transported by railroad companies of like nature. That during all of the times mentioned, the plaintiff was engaged in the business of shipping hogs, cattle, sheep and other live stock in carload lots from Montgomery City, Jonesburg, New Florence and High Hill to St. Louis, Missouri.

“ ‘And for his cause of action against defendants, states that on the 3rd day of January, 1912, plaintiff shipped two carloads of hogs from Montgomery City, Missouri, to St. Louis, Missouri, over said Wabash Railroad Company, owned and operated as aforesaid by the defendants, to the Independent Packing Company. That the distance between Montgomery City, Missouri, and St. Louis, Missouri, is over 75 miles and under 100 miles, to-wit, 85 miles; that the rate of charges prescribed by law upon the carload of hogs so shipped as aforesaid is and

was \$15.40 per car, amounting to \$15.40; but instead thereof, the defendants charged and plaintiff paid the sum of \$21.75, being in excess of the legal rates aforesaid in the sum of \$6.35, for which amount plaintiff asks judgment, and he asks that the same be trebled according to the provisions of section 3248 of the Revised Statutes of this State, and for all other due and proper relief.'

"The answer of defendants consists: (1) of a general denial; and (2) a special plea setting up the various proceedings had in a certain injunction suit instituted by the Wabash Railroad Company in the United States Circuit Court at Kansas City, Missouri, in the month of June, 1905, and the filing of its supplemental bill in June, 1907, to enjoin the enforcement of the rates fixed by the acts of the General Assembly of Missouri, approved April 15, 1905, and the act approved March 19, 1907, commonly known as the 'Maximum Freight Rate Acts.' The defendants in said suit were the then members of the Railroad and Warehouse Commission of Missouri, the Attorney-General, and certain individuals continually engaged in shipping over the line of the Wabash Railroad Company. Said individuals being sued as representing all of the shippers of the State as a class affected by the Maximum Freight Rate acts. With respect to this proceeding, the answer alleges the following facts:

"(1) That upon the filing of said bill of complaint, there was entered by said court an order restraining the Railroad Commissioners from taking any steps to put in force and effect the maximum rates mentioned in the said statutes; and from requiring the Wabash Railroad Company to post or file at any time or place said maximum rates or a schedule thereof, from taking, making out, printing or delivering any schedule of rates containing said maximum rates, from instituting any investigation of any complaint that the rate was unreasonable, extortionate or unjust, because higher than the maximum rate fixed by said statute, from directing the Attorney-General of the State or any prosecuting attorney in each and all of the counties in said State to prosecute or assist in prosecuting complainant, directly or indirectly, for any failure

to file a schedule adopting said maximum rates or for any failure to adopt or comply with the provisions of said statute. That all the defendants, as well as all shippers, affected by the proceeding be restrained from instituting any action or taking any steps to collect any penalties for the alleged violations of the provisions of said maximum freight rate acts.

“(2) That said restraining order also provided for the filing of an injunction bond in the sum of ten thousand dollars, conditioned to pay in case of the injunction being dissolved, all damages ascertained in said cause in the said court of the United States, to have been sustained by the defendants or any of them, or by any person becoming a defendant therein. That the Wabash Railroad Company, pursuant to such order, duly filed its bond in the amount and conditioned as required by said order.

“(3) That said cause proceeded to trial and final decree, which decree was entered on or about April 17, 1909, adjudicating and decreeing as follows:

“(a) The maximum freight rate laws of Missouri of 1905 and 1907, and the passenger rate law of 1907, to be confiscatory, and that none of the provisions thereof should, or could, be rightfully enforced against the complainant, its officers, agents or employees; (b) the Attorney-General and the Railroad Commissioners, their agents, employees and successors were enjoined from enforcing or attempting, directly or indirectly, by suit or in any other manner whatsoever, to enforce any of the provisions of or the penalties provided for in any of said rate acts; (c) the bills, to the extent only as they sought to present injunctive relief against the individual defendants sued as representatives of the class of shippers or passengers, should be and were dismissed without prejudice, provided, however, that if, at any future time, any of them should take, or threaten or attempt to take any action under said statutes, the court reserved the power to make such other order as justice required, and to bring into the case, any person not expressly made subject to the decrees, who might attempt or threaten to take any action or institute any proceedings against complainant

under either of said statutes; (d) no appeal should supersede the injunctive portions of the decree, but, pending any such appeal, complainant should be permitted to charge the rates previously permitted by law, the same as if the passenger rate act of 1907 had not been passed, and (e) that complainant, having been, by order herein of June 17, 1907, at the request of defendants, required to temporarily adopt, as a test, the rate fixed by the passenger law of that year, should be and was permitted, free from the interference of the parties to the suit and classes represented by them who were ordered not to interfere, to restore and put in force the rates so authorized by previous laws, subject to the reserved power and jurisdiction of the court from time to time to enforce, change or modify such requirement, as well as to protect complainant in being restored to the right of which said temporary order deprived it.

“(4) That the defendant state officers appealed from the said decree to the Supreme Court of the United States. That the individual defendants refused to join in said appeal, and as to them there was a severance, and no appeal was taken by them.

“(5) That on or about June 16, 1913, the Supreme Court of the United States reversed the decree which had been entered in the circuit court at Kansas City, and directed the bill of complaint of the Wabash Railroad Company to be dismissed without prejudice.

“(6) That on or about July 9, 1913, the mandate of the Supreme Court of the United States was filed with the clerk of the district court of the United States at Kansas City. That thereafter the present Attorney-General of the State, and the then members of the Public Service Commission, were substituted as defendants in said cause, for their predecessors in office; that said defendants then asked that the mandate of the Supreme Court be entered, and that a decree be entered dismissing the said cause without prejudice, which was accordingly done.

“At the trial, counsel for the plaintiff admitted the facts pleaded with respect to the proceedings in the Federal Court.

“The case proceeded to trial before the court (jury being waived). At the close of all the evidence the defendants interposed their demurrer to the evidence, which was by the court overruled, and the court took the case under advisement. And thereafter, on October 20, 1915, the court rendered judgment in favor of the plaintiff and against the defendants on each count of the petition, in the aggregate sum of \$890.91; and further found that defendants were liable to plaintiff as a penalty in the sum of \$2672.73, and entered judgment accordingly.

“The material facts with respect to the shipments set forth in the various counts of the petition were covered by a stipulation between the parties, which stipulation shows the date of the shipment, the number of the car in which the shipment was made, the length of the car in feet, and the amount of freight charged and collected.

“The testimony further showed that plaintiff consigned the various shipments either to the Independent Stock Yards, the Independent Packing Company, or the St. Louis Dressed Beef Company, all located within the city limits of the city of St. Louis. That the Wabash Railroad was unable to make deliveries to these consignees, because its line of railroad did not extend to their industrial plants. Deliveries were made in the following manner: The Wabash hauled the shipments to its point of interchange, in the city of St. Louis, with the St. Louis Terminal Railroad Association, and there delivered the cars to the Terminal. The Terminal hauled the cars from the point of interchange to the industrial plants of the consignees, and effected the delivery; so that, as to each of the shipments, two carriers were involved in the transportation from point of shipment to point of destination.

“The testimony further showed that all of the shipments were made during the months from January, 1912, to June, 1913, both inclusive; that during said time the defendants charged and collected freight upon said shipments computed according to their tariff then in effect, which fixed the rates at a certain number of cents per hundred pounds, instead of a per car basis as fixed by the Maximum Freight Rate statute.

“The evidence further showed that under said tariff of rates, the Wabash Railroad did itself pay the Terminal Railroad Association for the service of that company, in hauling the cars from the point of connection of its line with the Wabash to the final destination of the shipments. In the language of the freight men, the Wabash ‘absorbed’ the Terminal charges out of its freight rate. The charge made by the Terminal Railroad to the Wabash for its service was three dollars per car on all shipments consigned to the Independent Packing Company and the St. Louis Dressed Beef Company, and \$1.50 per car on all shipments consigned to the Independent Stock Yards. The haul of the Terminal on shipments consigned to the Independent Packing Company and St. Louis Dressed Beef Company was about one mile, and the haul on shipments consigned to the Independent Stock Yards was about the same distance.

“It was conceded by the plaintiff that the defendants had the right to charge against the plaintiff whatever charges it was required to pay to the Terminal Company, to effect the deliveries; whereas, the defendants contended that if plaintiff was entitled to ship his stock at the rates prescribed by the Maximum Freight Rate Act of 1907, then the defendants were entitled to charge the full statutory scale of rates for the actual distance which they hauled the shipment over their line, and likewise, the Terminal Company was entitled to charge the full statutory scale of rates for the distance it hauled the shipments over its line.

“The defendants requested the court to declare the law that, under the facts disclosed by the testimony, the plaintiff is not entitled to recover treble damages on either count of the petition, but the court refused to so declare the law, and defendants contend that such refusal is violative of the constitutional rights of the defendants under sections 10 and 30 of article 2 of the Constitution of this State, and contrary to the Fourteenth Amendment to the Constitution of the United States.

“These various legal propositions were preserved in defendants’ motion for a new trial and in arrest of judg-

ment, both of which the court overruled, and defendants thereupon perfected their appeal to this court, on the ground that the decision in the case involved the construction of the said provisions of the Constitution."

Defendants rely on the following errors for a reversal of the judgment:

"1. The trial court erred in overruling defendants' demurrer to the evidence at the close of all the testimony.

"2. The trial court erred in giving judgment to plaintiff for treble damages.

"3. The trial court erred in giving plaintiff's declarations of law numbered one, two and three.

"4. The trial court erred in refusing to declare the law to be as requested in defendants' declarations of law numbered one, two, three and four.

"5. The judgment is erroneous because excessive, and contrary to the law and the evidence."

I. While this suit is between plaintiff White and the receivers of the Wabash Railroad Company, yet eminent counsel for numerous other roads which have cases pending in the various courts of this State, involving similar questions to those here presented, asked and
Suspension
of Statute
During In-
junction.
and were granted permission to file herein briefs *amicus curiae*; and while we have read and carefully considered all of them, yet we are not permitted to dispose of some of the questions therein discussed, because they are not involved in this case, and there are others discussed which are substantially the same as those presented and discussed by counsel in this case; consequently it would be a supererogation of labor to expressly notice and consider all of them separately in this opinion. However, we will try to write the law as we understand it to be, as gathered from all of the briefs in the case, which show great learning and much industry in the presentation of the propositions involved.

Counsel for defendants ask that the judgment of the circuit court be reversed for numerous reasons assigned; the first of which is: that the Maximum Freight Rate Act

of 1907, of this State, was suspended during the pendency of the injunction suit, mentioned in the answer, in the courts of the United States, and therefore the alleged damages suffered by the plaintiff are *damnum absque injuria*, because they directly flowed from the legitimate prosecution of the injunction suit.

For the purpose of clarity, this position of counsel should be considered and disposed of under three separate heads, namely: first, the intention of the Legislature regarding the penalty prescribed by said act for its violation during the pendency of the injunction suit mentioned in the answer, pending in the circuit court of the United States for the Western District of Missouri; second, the alleged suspension of the Maximum Freight Rate Act, regarding plaintiff's right to recover the excessive freight charges paid by him to the defendants; and, third, are the actual damages, the overcharges paid by plaintiff, *damnum absque injuria*?

We will dispose of these three propositions in the order stated.

Penalty
Pendente
Lite.

Attending the first: Was said penalty clause of said Act suspended during the pendency of said injunction suit in said United States Circuit Court?

In support of the affirmative of this interrogatory, counsel have cited us to the following cases: *State ex inf. v. Railroad*, 176 Mo. 687; *Young v. Railroad*, 33 Mo. 509; *Winsor Coal Co. v. Railroad*, 52 Fed. 716; *State v. Railroad*, 130 Minn. 144; *Wadley Southern Ry. v. Georgia*, 235 U. S. 651; *Coal & Coke Ry. Co. v. Conley*, 67 W. Va. 129, affirmed 230 U. S. 1. c. 522.

The first case cited has no application to the case at bar. That was a proceeding by *quo warranto* brought by the Attorney-General against the Atchison, Topeka & Sante Fe Ry. Co., to forfeit its charter for an alleged violation of the law, in charging shippers of grain to Kansas City, a "reconsignment charge," that is, a charge made by the defendant for transferring cars of grain from its tracks to the tracks of other companies. Upon that state of facts the court held, and properly so, that said charges

were not included in the statutes regulating freight rates, and that since the service was actually performed by the defendant, and the charges were reasonable, there was no violation of the statute or the common law of the State, and for that reason, among others, found the defendant not guilty.

The second case cited is an erroneous citation.

In the case of Winsor Coal Co. v. C. & A. R. R. Co., 52 Fed. 716, it was held by Judge PHILIPS, District Judge, that the Triple-Damage Statute of 1887 did not apply where the carrier did not charge a rate in excess of the maximum rate established by the Railroad Commissioners, or the maximum rate permitted by the statute in the absence of any action thereon by the commissioners. That ruling, in my opinion, was correct, but clearly it has no application to this case.

The case of State v. Chicago, M. & St. P. Ry. Co., 130 Minn. 144, was a criminal prosecution founded upon an indictment for the violation of the Minnesota statute fixing passenger rates, and prescribing a penalty for its violation. Prior to the institution of that prosecution an injuncton suit, similar to the one mentioned in the answer in the case at bar, was brought in the circuit court of the United States for the District of Minnesota enjoining the enforcement of the Passenger-Rate statute. Under that state of facts the Minnesota court held that defendant could not be convicted of a felony for violating the statute during the pendency of the injunction. That case, in my opinion, was properly decided, and clearly supports the proposition under consideration. To have held otherwise would have been a stroke at the very warp and woof of constitutional form of government, and if that clause of the statute had been sustained, the very rock-ribbed foundation of republican form of government would have been demolished. It not only violates the State and Federal constitutions, but, if valid, practically abolishes them. This is apparent to every one, for if such a penal statute should be upheld under the circumstances, then the penalty could be increased to such a degree that no one would dare challenge its constitutionality. In other words, if

the penalty of such a statute should be held operative during the pendency of the injunction suit, then but few, perhaps, would be bold enough to test its validity, especially in doubtful case; but fortunately for the citizens of this country, both the State and the Federal constitutions provide that "courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character," etc. [Sec. 10, art. 2, Constitution of Missouri, 1875.]

Section 2 of Article 4 of the Constitution of the United States, and section 1 of the Fourteenth Amendment thereof, extend the rights guaranteed by the Missouri constitutional provision mentioned, to all citizens of the United States. [Chambers v. Railway, 207 U. S. 142-148; International Textbook Co. v. Pigg, 217 U. S. 91.]

The same ruling has been announced by this court in the cases of International Textbook Co. v. Gillespie, 229 Mo. 397; British-American Portland Cement Co. v. Citizens Gas Co., 255 Mo. 1; Gold Issue Mining & Milling Co. v. Pennsylvania Fire Ins. Co., 267 Mo. 524.

The Supreme Court of the United States in the case of International Textbook Co. v. Pigg, supra, held that a statute of Kansas denying the right of a foreign corporation to sue in the courts of that State without first taking out a license to do business therein, was unconstitutional, null and void, and in so doing, used this language: "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the *highest and the most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution.*" "

In the discussion of similar statutes this court in the cases cited, followed the rule just announced; and that being the law, it brushes aside all statutes making it necessary for citizens of this State and of the United States to

first procure a license in order to exercise their constitutional right to sue and be heard in the courts of the country; then how much stronger is the reason for holding a statute unconstitutional which makes it a felony for a person to challenge the constitutionality of a statute, which it is claimed, if enforced, would confiscate the property of the contestant or take it without due process of law, as was claimed in the injunction suit mentioned, also in the Minnesota injunction suit? To deter a person from asserting his constitutional rights in a court of justice by prescribing excessive penalties, physical force or mental restraint, is for all practical purposes a denial to him of due process of law; he can only have the benefit of the due process-clause of the Constitution, by going into court, being given a hearing and having judgment pronounced according to the law of the sovereignty; and if for any good reason he is denied that right, then he has not had his day in court, within the meaning of the State and Federal constitutions. In other words, the courts of this country will no more permit a partial closing of the doors of courts of justice to litigants, than they will tolerate a complete closing—the fundamental law of the land established the courts, and by providing that they should be opened to all, means that they have no doors to close in the face of a bona-fide litigant; consequently any statute which denies or trammels the right of a person to freely present his lawful rights to a court of justice for determination, must yield to the superior mandate of the Constitution.

A case perhaps more in point than those cited, is that of *State ex rel. v. Johnston*, 234 Mo. 338, following the rule announced in the case of *Herndon v. Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 135. In that case the Northern Arkansas Railway Company, a foreign corporation, duly licensed to do business in this State, was sued by a citizen of Missouri, in the circuit court of Newton County. In proper time and in due form, the company filed a petition in that court to remove the cause to the circuit court of the United States for the Western District of Missouri, on the ground of diversity of citizenship. Thereupon proceedings were instituted under the Act of

March 13, 1907, to forfeit the license of said company to do business in this State, which in effect provided that if any foreign corporation licensed to do business in this State should apply for a removal of a suit brought in any court of this State against it, etc., by a citizen of Missouri, it should thereby forfeit its right to do business herein. Thereupon the State, at the relation of said railroad company, applied to this court for a writ of prohibition to prohibit the circuit court of Newton County and the Secretary of State from proceeding further in the proceedings brought to forfeit the license of said company. A temporary writ was issued, and upon the return coming in, the cause was heard upon its merits, and following the cases of *Western Union Tel. Co. v. Kansas*, 216 U. S. 1; *Pullman Co. v. Kansas*, 216 U. S. 56; *Ludwig v. Western Union Tel. Co.*, 216 U. S. 146; *Southern Railway Co. v. Greene*, 216 U. S. 400, and *Herndon v. Chicago, Rock Island & Pacific Ry. Co.*, *supra*, held said Act of March 13, 1907, unconstitutional, null and void. The real ground of that decision was that the Legislature of this State had no power, directly or indirectly, to prohibit the railroad company from exercising its right, under the Constitution of the United States, to remove said cause from the circuit court of Newton County to the circuit court of the United States.

If, therefore, the company had the constitutional right to remove said cause to the United States court, as all of said cases hold, then that right could not be abridged or prohibited by a statute of this State by imposing a penalty upon it for attempting a removal.

The case of *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651, was a case where a statute of the State of Georgia empowered the Railroad Commission, after a hearing, to make an order prohibiting railroad companies from demanding freight payment in advance on merchandise received from one carrier, while it accepts merchandise of the same character at the same point from another carrier without such payment. In that case the court held that the order was not so arbitrary and unreasonable as to be violative of the due process clause of the Fourteenth

Amendment. It also held that a State has power to impose penalties sufficiently heavy to secure obedience to orders of public utility commissions after they have been found lawful or after the parties affected have had ample opportunity to test the validity of administrative orders and fail so to do; and that a party affected by a statute passed without his having an opportunity to be heard is entitled to a safe and adequate judicial review of the legality thereof. It is a denial of due process of law if such review can be effected by appeal to the courts only at the risk of having to pay penalties so great that it is better to yield to orders of uncertain legality than to ask the protection of the law.

In the case of *Railroad v. Conley*, 67 W. Va. 129, the court in discussing a similar rate statute held it invalid, as indicated by the 21, 22 and 23 paragraphs of the syllabus, which are as follows:

“21. *Constitutional Law—Due Process of Law—Railroad Rates.* Legislative reduction of such charges so as to prevent the earning of such remuneration, amounts to a taking of private property for public use, without compensation to the owner thereof, and a rate-regulating statute, so operating, is void, in so far as it has such effect, being in conflict with section 10 of article 3 of the Constitution of this State and the Fourteenth Amendment to the Constitution of United States, inhibiting deprivation of property without due process of law, and also with the equality clause of said amendment.

“22. *Corporations—Public Service Corporations—Rate Regulating Statute.* A public service corporation is entitled to a judicial inquiry as to whether, in point of fact, a rate-regulating statute is confiscatory, and, if the Legislature has failed to prescribe or designate a mode of determining such question, the party aggrieved may invoke any appropriate remedy therefor in law or equity.

“23. *Statutes—Partial Inability—Effect.* If penalties are prescribed in such a statute as a sanction for due enforcement thereof, and the persons and corporations affected thereby are not expressly or impliedly excepted from the operation of the penal clause, pending such

judicial inquiry, and the penalties are so heavy and severe as to expose such persons and corporations to great risk of loss in prosecuting such inquiry, the entire statute is void on its face in so far as it so interferes, unless the penal clause is separable from the rate prescribing clause, in which case the former only is void to the extent aforesaid."

The latter case was taken to the Supreme Court of the United States, and was affirmed by that court. The opinion is reported in 230 U. S. 513.

By a careful reading it will be seen that all of the cases cited by counsel for defendants that are in point, fully support the contention that the penalty clause of such a statute is suspended during the pendency of a suit to test the constitutionality of the statute which the penalty is designed to enforce.

But upon principle it seems to me that where a person is in good faith challenging the validity of a statute, the penal clause thereof, whether severe or lenient, should be suspended pending the litigation brought for that purpose. In my opinion, it was never the intention of the Legislature to have the penalty enforced during the pendency of the suit; but concede that such was its design, then, in my opinion, such clause would nevertheless, under the constitutional provisions mentioned, be suspended during that period.

I am therefore of the opinion, based upon both principle and authority, that the penal section of the rate-statute was suspended during the pendency of the injunction suit testing the constitutionality of said act.

Regarding the second proposition previously mentioned, namely, was the rate act itself suspended during the pendency of the injunction suit testing the constitutionality of the act proper?

**Suspension
of Statute
Pendente Lite.**

The cases heretofore cited and considered are relied upon by counsel for defendants in support of their insistence that it was suspended, and therefore they contend that there was no overcharge made against or collected

from plaintiff in any of the shipments mentioned in the petition.

After a careful consideration of those cases we are clearly of the opinion that they are not authority for counsel's position. They were leveled at the penalty statute, and not at statutes fixing the rates of freight and passenger charges to be made and collected for the transportation of freight and passengers.

In fact, no good reason has been assigned, or authority cited, in support of that contention. The act having been held valid by the Supreme Court of the United States, in the injunction suit mentioned in the answer, that seems to be an end of that question. I know of but two ways to suspend or repeal a statute duly enacted, and the first is by an act of the Legislature expressed or implied in the same or in a subsequently enacted statute, and second, by the courts of the State, in declaring a statute invalid in the exercise of their judicial authority.

The statutes now under consideration have never been suspended or repealed by any act of the Legislature, nor declared by any court to have been inoperative for any length of time, except the circuit court of the United States for the Western District of Missouri, which held the entire act unconstitutional; but that ruling was overruled by the Supreme Court of the United States when the case reached there on a writ of error, thereby abrogating the judgment of the lower court *ab initio*.

We, therefore, hold that the act under consideration was not suspended during the pendency of the injunction mentioned, except as to the roads excepted by the judgment of the Supreme Court of the United States in said cause.

The third position mentioned by counsel for defendant is untenable; the contention being that "the damages (the overcharges made and collected from plaintiff) resulting to plaintiff are *damnum absque injuria*, because they directly flow from the legitimate prosecution of the injunction suit."

**Damnum
Absque
Injuria.**

In support of that contention we are cited to the following authorities: *Meysenburg v. Schlieper*, 48 Mo. 426; *City of St. Louis v. Gaslight Co.*, 82 Mo. 349; *State ex rel. v. Williams*, 221 Mo. 227, l. c. 264-5; *Albers Comm. Co. v. Spencer*, 236 Mo. l. c. 628; *Fruit Packing Co. v. Cutting*, 133 Cal. 237; *Clay Center v. Williamson*, 79 Kan. 485; *Russell v. Farley*, 105 U. S. l. c. 445; *Meyers v. Block*, 120 U. S. 206, l. c. 208; *Tullock v. Mulvane*, 184 U. S. 497; *Railroad v. Elliott*, 184 U. S. 530; *Houghton v. Meyer*, 208 U. S. 149; *High on Injunction* (4 Ed.), sec. 1663.

We have read and carefully considered these cases and after due deliberation are of the opinion that none of them are in point.

The case of the *City of St. Louis v. Gaslight Co.*, supra, is a fair sample of the rule announced in all of said cases. In that case the facts were these:

"The city of St. Louis instituted a suit in the circuit court, the object of which was to compel the St. Louis Gaslight Company to convey all its works to the plaintiff, to obtain an accounting of the rents and profits of the works and property subsequent to January 1, 1870, with decree of payment of the net balance thereof over expenses, and an order enjoining the company from any further prosecution of its business and for the appointment of a receiver to take charge of the works and carry on the business until the further order of the court. No temporary injunction was asked or granted, and for that reason no injunction bond or stipulation by the plaintiff to pay damages consequent upon a dissolution of the injunction appear in the case.

"After a final hearing of the case upon its merits, the remedy as prayed for by plaintiff was granted, and the property was taken from the control of the company, and all further prosecution of its business enjoined. Upon appeal to the St. Louis Court of Appeals, this decree was affirmed, from which action of said court the company appealed to the Supreme Court. In this court the judgments of the lower courts were reversed and the cause was remanded, with directions to the circuit court to enter

a rule requiring the receiver to restore to the company all the gasworks and property held by him in virtue of the decree, together with the profits derived therefrom, and to report his action thereon to the court; and upon approval of said report to dismiss the bill. [City of St. Louis v. St. Louis Gaslight Co., 70 Mo. 69.] After the mandate of this reversal was received by the circuit court, the defendant filed a motion with the view of having it carried out. In this motion the court was asked to ascertain and assess damages suffered by defendant by reason of the injunction before dismissing the bill. The damages claimed were stated in the bill of particulars as resulting from the reduction in the price of gas during the litigation, from reduction in the cost of lighting, extinguishing and cleaning public lamps, from expenditures incurred by the receiver and from attorney's fees, aggregating in all the sum of \$549,475.23. Soon after the filing of this motion the court entered a final decree dissolving the injunction and dismissing the cause without taking any notice of that part of the motion which asked for an assessment of damages."

The chief differentiation of that case from the case at bar is this: There, every cent the city collected, through its receivers, from the patrons of the Gaslight Company, during the time the injunction was in force, was properly accounted for to it, upon the dissolution of the injunction, and the city did not retain a penny of the company's money; whereas in the case at bar, the defendants, upon the dissolution of the injunction, issued by the circuit court of the United States, have not refunded to plaintiff any of the money it collected from him during the pendency of the injunction, which was in violation of the rate act mentioned. The other damages the Gaslight Company complained of were of the character that naturally flow from the institution and prosecution of any ordinary suit, which cannot be recovered except as may be expressly provided for by law, or in a suit for malicious prosecution, where it is shown the suit was not brought in good faith. Clearly that case has no application to the case at bar; nor are any of the others cited applicable.

The only case cited, or that we have been able to find, which is directly in point, is that of *Love v. North American Company*, 229 Fed. 103, decided by the United States Circuit Court of Appeals from the Eighth Circuit. In that case the Corporation Commission, under an Arkansas statute, fixed certain freight rates to be charged by railroads for the transportation of freight in that State; from the order fixing said rates the Frisco Railway Company appealed to the Supreme Court, and gave the *supersedeas* bond conditioned for the refunding of all charges collected above the rate so fixed, pending the appeal, if affirmed by the Supreme Court. For the purposes of this case the order of the commission was affirmed, and the railroad company collected freight charges in excess of the rates fixed by said order. In the meantime the road had gone into the hands of receivers appointed by the United States Circuit Court for the District of Arkansas. In due time, the shippers of freight over that road, during the pendency of said appeal, the period the excessive rates had been charged and collected, presented their claims to the receivers for allowance as preferred claims against the road. Without stopping to notice the ruling of the circuit court, the Court of Appeals, in ruling in favor of the shippers, used this language:

“The question now might be properly asked to whom do the excessive charges received by the Frisco Company for the transportation of freight belong? They certainly do not belong to the general creditors of the Frisco Company, nor to the bondholders, nor to the Frisco Company itself. Without question they belong to the shippers. We must not be deceived as to the true status of this claim, nor allow the bond, or the fact that the claim is presented by the corporation commission to blind us to the fact that the claim is one due to the shippers for excessive charges paid by them to the Frisco Company for transportation of freight. The shippers not only paid the lawful charge, but they did more—they paid an excessive charge. That payment was an illegal exaction, and as against the railroad company and volunteers like the receivers the money be-

longed to the shippers after the payment the same as before."

After a careful consideration of that case, we are satisfied with the reasoning and the conclusions reached by the court.

The rate statutes here under consideration are valid, as held by the Supreme Court of the United States, and therefore, the excessive charges collected from plaintiff were unlawfully collected. So the question naturally arises, as asked by said Circuit Court of Appeals, to whom do the excessive charges collected by the Wabash Company from the plaintiff for the transportation of his freight belong? They do not belong to the general creditors of the Wabash Company, nor to the bondholders nor to the Wabash Company, itself. Unquestionably they belong to the plaintiff in this case.

It must therefore follow that the judgment of the circuit court in so far as those collections are concerned, is correct, without it is reversed for some other reason assigned by counsel for defendants.

II. Counsel for defendants finally insist that the judgment of the circuit court must be reversed for the following reason: "The Court's finding of fact in each count of the petition is contrary to the law and the evidence, and the judgment based thereon is excessive, because the court erroneously failed to allow each of the two carriers (the defendant company and the Terminal Railway Company, to which defendant delivered the cars of freight for transportation and delivery to the consignees) hauling the shipments, its maximum charges, as provided by the Maximum Freight Rate Act.

It should be remembered that the consignees of the live stock shipped by plaintiff were not located upon the line of the defendants' road, but about a mile and a half beyond its terminus, on the line of the St. Louis Terminal Railway Company, and that the latter company transported said stock to the various consignees, for a consideration charged to and paid by the defendant company, and by the latter charged to and collected from the plaintiff.

Under that state of facts this insistence of counsel is a moot question, for the reason that the Terminal Company never made nor collected of the defendants the charges now made for it by them. It charged three dollars per car for the services it performed for the plaintiff, and he has fully paid those charges, and the defendants have no legal right at this late day to surcharge plaintiff's account with the items now claimed by them.

This view of the case also relieves us of the duty of deciding whether or not under the facts of this case the continuous mileage provision of section 3241, Revised Statutes 1909, is in conflict with the preceding parts of the section fixing reasonable rates to be charged, as contended for by counsel for defendants.

For the reasons stated, the judgment is reversed and the cause remanded with directions to the circuit court, to enter judgment for the plaintiff for the actual excessive charges made and collected from plaintiff, less the sum the defendants paid the Terminal Company for delivering the cars to the consignees of the live stock shipped. All concur; *Bond, J.*, concurs in separate opinion.

BOND, J. (concurring)—I concur only in the result reached in the majority opinion. The reasons for my concurrence are that when the suit of the State against the Chicago & Alton Railroad was held, by a divided court, not to be maintainable (265 Mo. 646), the points were pressed in argument that no recovery could be had by any shipper for charges exceeding the maximum rate fixed by the statute for the carriage of freight, pending an injunction suit brought in the Federal court to restrain the enforcement of that statute, and that in any event the amount fixed in the injunction bond given in the Federal court was the limit of liability on the part of the carriers. I dissented to the conclusion reached in the majority opinion in that case and in the course of my dissenting opinion I discussed, *in extenso*, the law applicable to those two questions. [265 Mo. l. c. 705, paragraph III of my dissenting opinion.] What was said at the beginning of that paragraph and ending on page 709, expresses fully the legal

reasons why the State or any other shipper might recover the excessive rates charged by a carrier disobeying the statute during the pendency of a Federal injunction, and why such recovery could, neither in law nor logic, be limited to the amount of the bond given for the obtention of the injunction. It is unnecessary to republish what is there said. But for the reasons there given I concur in so much of the conclusion of the present majority opinion as affirms the right of the shipper to recover any overcharge exacted from him by a carrier during the temporary existence of the Federal injunction.

AMERICAN MANUFACTURING COMPANY v. CITY
OF ST. LOUIS, Appellant.

In Banc, February 13, 1917.

1. **TAXATION: Property Outside State.** A city of Missouri has no power to levy a direct property tax upon subjects of taxation outside the State. The subjects of taxation are persons, property and business, and each must be situate within the jurisdiction of the taxing power to authorize its exercise.
2. ———: **License & Property Tax.** The *ad valorem* tax levied under our State laws upon merchants and manufacturers, though levied in the form of a license, is a tax upon property, as distinguished from taxes upon business.
3. ———: **Manufacturer's License: Right to Sell Goods Stored Elsewhere.** The city of St. Louis has the power to license and tax manufacturers within its limits, and to prohibit them from pursuing their manufacturing business unless such license is secured; and the tax may be graduated according to the amount of sales; and, tax may be graduated according to the amount of sales; and, hence, the manufacturing company must pay a license tax on goods made in the city, whether they are stored within this State or elsewhere before sale, and whether sold from the company's office in this State or from its principal office located in another State.

Appeal from St. Louis City Circuit Court—*Hon. Wilson A. Taylor*, Judge.REVERSED AND REMANDED (*with directions*).*Charles H. Daues* and *Truman P. Young* for appellant.

(1) The license tax of one dollar per thousand upon sales levied by the ordinances of the city is an occupation tax, and not a tax upon property. In this respect it is distinguishable from the *ad valorem* taxes. *American Union Express Co. v. St. Joseph*, 66 Mo. 681; *Clark v. Titusville*, 184 U. S. 333; *Society for Savings v. Coite*, 73 U. S. 608; *Maine v. Grand Trunk Ry. Co.*, 140 U. S. 227-8; *Home Insurance Co. v. New York State*, 134 U. S. 600; *Aurora v. McGannon*, 138 Mo. 48; *St. Louis v. United Railways Co.*, 210 U. S. 279; *St. Louis v. United Railways Co.*, 263 Mo. 441; *State ex rel. American Mfg. Co. v. Alt*, 224 Mo. 493; *Jarman v. School District*, 264 Mo. 654. (2) The occupation tax levied upon sales is a tax upon the privilege of manufacture. It is a manufacturer's license and not a merchant's license. The amount of the tax is graduated by the amount of sales, but is in no sense a tax upon sales nor a tax upon the goods sold. The city may collect an *ad valorem* tax upon property used in a business and at the same time impose a license tax upon the pursuit of that business. *St. Louis v. Ernst*, 95 Mo. 367; *St. Louis v. Green*, 70 Mo. 562; *State ex rel. v. Tracy*, 94 Mo. 217; *Brookfield v. Tooev*, 141 Mo. 625; and cases cited above. (3) A license tax levied upon a manufacturer and graduated in accordance with the amount of sales made by such manufacturer should include a tax on account of all sales of goods manufactured, even though such goods are destined for interstate commerce or have been shipped into other States and there warehoused pending sale. A State may tax all occupations and all businesses carried on within its borders, and all privileges and franchises derived from the State. Such a tax is not a tax upon interstate commerce, though the amount is arrived at by considering the sale of products

which are destined for such commerce. *United States v. Stowell*, 133 U. S. 16; *Coe v. Errol*, 116 U. S. 524; *Car Co. v. Pennsylvania*, 141 U. S. 18; *Ferry Co. v. Pennsylvania*, 114 U. S. 196; *Tel. Co. v. Attorney-General*, 125 U. S. 549; *Railroad v. Knight*, 192 U. S. 21; *Match Co. v. Ontonagon*, 188 U. S. 82; *Hopkins v. United States*, 171 U. S. 578; *Galveston Ry. Co. v. Texas*, 210 U. S. 225; *Ficklin v. Shelby County*, 145 U. S. 1; *Hatch v. Reardon*, 204 U. S. 152; *State v. Brodnax & Essex*, 228 Mo. 25, 219 U. S. 285; *Am. Mfg. Co. v. St. Louis*, 238 Mo. 277; *State v. Applegarth*, 28 L. R. A. 816. (4) The taxes considered in the third paragraph of the opinion in the case of *American Manufacturing Co. v. St. Louis*, 238 Mo. 278, were on account of sales of products manufactured at a factory in New York. Such sales should be clearly distinguished from the sales in controversy here, which were of the products of the St. Louis factory.

Barclay & Wallace for respondents.

(1) The city ordinance in evidence under the supposed authority of which was extorted the payment of one dollar on each thousand dollars of the sales of goods manufactured in St. Louis (but sold and delivered while same were outside of Missouri) furnishes no justification for the exaction in question. The effect of that ordinance has already been construed by this court in accord with respondents' contention on that point. *Am. Mfg. Co. v. St. Louis*, 238 Mo. 278. (2) Said ordinance is a personal property tax; and had it been intended to provide for a tax on such sales it would, as to the same, be clearly invalid under the Federal Constitution, for such a tax on such sales, as such, would be a direct interference with and burden on interstate commerce; and the city could not indirectly accomplish the same result by clothing this tax in the garb of an occupational license. Nature of tax: *State ex rel. v. Alt*, 224 Mo. 506; *Jarman v. School Dist.*, 264 Mo. 654. Validity of ordinance: *Welton v. Missouri*, 91 U. S. 275; *Crinshaw v. Arkansas*, 227 U. S. 389; *Barrett v. New York*, 232 U. S. 14; *D. E. Foote & Co. v. Stanley*, 232 U. S. 494; *Davis v. Virginia*, 236 U. S. 697.

BROWN, C.—This case, like the one numbered 18185 decided at this term, is to recover license taxes paid the city of St. Louis by the plaintiff, a corporation of West Virginia of the same name as, and successor to, the plaintiff in the other case, in the manufacture of Jute bagging.

The questions raised in this appeal are the same as those raised in the other case, with the addition that in this case the tax exacted for manufacturer's license was extended upon sales of goods manufactured in the city of St. Louis, and warehoused outside the State of Missouri, and sold and delivered from such warehouses to customers outside the State, for which, with other items not now in dispute, judgment was rendered for the plaintiff with interest at six per cent from the date of payment.

The sales in dispute were described in the plaintiff's return as follows: "Sales made through St. Louis office and filled from stock made in St. Louis, but shipped from points other than St. Louis to States other than Missouri." In its evidence its bookkeeper and cashier explained this by saying that the company had a dozen warehouses in St. Louis; that he did not know how many there were in New York, and that the bagging is stored in St. Louis as long as the company can find a warehouse to take it, and when the local capacity is exhausted it ships to Memphis or points like New Orleans, from which places orders are filled from goods made in St. Louis, which may lie there for a year.

In its letter June 23, 1910, transmitting a check tendered as payment of its license tax, the respondent wrote: "In explanation of the small aggregate amount of our sales for the year ending June 1, 1910, we would say that during that year the principal selling office of this company has not been in the city of St. Louis, as had been the case in prior years;" and in a letter of July 21, 1910, made the following additional explanation: "Since our report for year ending June 30, 1909, was made, we made a very material change in our method of doing business with our home office in New York, so that substantially all our sales, though negotiated here, of merchandise stored in this and other cities, are confirmed by and are not ef-

fective until they are confirmed by the home office in New York. We are advised by our counsel that sales so made are not taxable in the city of St. Louis.

The matters at issue in this appeal are: (1) whether the circumstances under which the payment was made were voluntary or involuntary with respect to the right to recover it back; (2) whether interest was recoverable; and (3) whether the city had the right to levy the license tax based on the amount of these sales.

We have stated these questions in the order named because the first two are decided by us in the other case, in which they were presented upon precisely similar facts and with the same arguments, and we see no reason to modify the opinion there expressed.

The important question relates to the nature of the tax, for the defendant city has not the right to levy a direct tax upon subjects of taxation outside the State from which it holds its powers. These subjects are *persons*, *property* and *business*, and each must be situated within the jurisdiction of the taxing power to authorize its exercise. The vital difference between these parties is whether the tax in question is a tax upon *business* done in the city of St. Louis or upon *property* situated in States other than Missouri. The dividing line must be definite, however; for if a part of the subject upon which the tax is sought to be imposed is situated in another State we have no data by which it can be apportioned, and, as is said by Judge COOLEY (1 Cooley on Taxation, 25), "the power of taxation, however vast in its character, and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."

On the other hand the State may exercise this sovereign right with respect to all persons, things and business activities which exist under the protection of its laws, and, as is said by the same distinguished author (*Ibid.*), "Unless restrained by provisions of the Federal Constitution, the power of the State as to the mode, form and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." These

Manufacturers'
Tax: Graduated
According to
Sales.

propositions have ceased to be subjects of discussion or argument.

It is evident that the *ad valorem* tax levied under our State laws upon merchants and manufacturers, is a tax upon property, as distinguished from taxes upon business. The same property would be subject to taxation while its *situs* is within the State, whether employed in any activity or not. The quality of value is the test of its character in this respect, while the mode, form and extent of this taxation are wholly within the broad powers of the State. In their exercise the Legislature has prescribed the time and manner of the assessment of this class of property, and as one of the remedies for the collection of the tax, has provided that its payment shall be a condition of the right of the owner to transact the business in which the property has been employed or produced, until it shall be paid. This imposition has every element of a property tax, and is held to be such by this court. [Jarman v. Unionville School District, 264 Mo. 646; State ex rel. v. Alt, 224 Mo. 493.]

Our statute (R. S. 1909, sec. 11647) defines a "manufacturer" to be a "person, company or corporation who shall hold or purchase personal property for the purpose of adding to the value thereof by any process of manufacturing, refining, or by the combination of different materials." It is not disputed that under the broad provision of its charter the city of St. Louis has the power to license and tax manufacturers within its limits; nor that the power includes the right to impose a tax upon the transaction of their business. Adopting substantially the definition we have quoted from the statute, it has, by ordinance, forbidden them to pursue their business within the city without procuring a license, and has prescribed the additional tax they shall pay for that purpose, which is graduated to accord with the amount of business they shall carry, to the point of realizing the profit or liquidating the loss by the sale of the product of their work. They may only buy and sell in pursuance of their business as manufacturers. That his right to pursue this business is the one thing he re-

ceives as compensation for this tax is evident; and that the method of fixing its amount by the amount that he realizes from the licensed activity is a just and equitable one is not disputed; nor is the inherent justice and fairness of postponing the payment until the realization of the result of the work. The tax is none the less a tax upon the business of manufacture pursued in the city of St. Louis under the protection of the laws of this State and the ordinances of the city. Any other interpretation of the ordinance under which the business is licensed would not only do violence to its terms, but would ascribe to the legislative department of the city the absurd intention to give every person and corporation that might desire to avail themselves of it, the unlimited right to pursue the business of manufacturing in the city without license or the payment of any tax upon the privilege provided they would store their product outside the city limits and sell it through non-resident agencies, to customers in other States.

To sustain this proposition the respondent cites us to our own decision in Banc in the case of *American Manufacturing Company v. St. Louis*, 238 Mo. 267, in which the learned judge who wrote the opinion said (p. 279) that "a fair and reasonable construction of defendant's ordinance is that it was only intended to cover sales actually completed; and shipments made from defendant city." The question now before us was not involved, either directly or indirectly, in that case; but the respondent, while it was pending here and under the advice of counsel, "made a very material change" in its "methods of doing business," so that substantially all its sales, although negotiated in St. Louis, were not effective until confirmed by its home office in New York. The question is now for the first time before us in this case.

We hold that the tax in question is a tax upon the privilege of pursuing the business of manufacturing these goods in the city of St. Louis; that when the goods were manufactured the obligation accrued to pay the amount of the tax represented by their production when

State ex rel. v. Ellison.

it should be liquidated by their sale by the manufacturer; that their removal from the city of St. Louis and storage elsewhere, whether within or without the State worked no change in this obligation; that their sale by the respondent wherever they may have been stored at the time, whether it was done through its home office in New York or the office of its factory in St. Louis, should have been reported in its return to the license collector of the city of St. Louis and the amount included in fixing the amount payable on account of its license tax.

The judgment of the trial court is accordingly reversed and the cause remanded with directions to enter judgment in accordance with the view here expressed.

Railey, C., concurs.

PER CURIAM:—The foregoing opinion of BROWN, C., in Division Number 1 is adopted by the Court in Banc. All of the judges concur.

■

THE STATE ex rel. SECURITY INSURANCE COMPANY v. JAMES ELLISON et al., Judges of Kansas City Court of Appeals.

In Banc, February 13, 1917.

CERTIORARI: Quashing Judgment in Like Cases. Where suit was brought on policies of fire insurance against several insurance companies, and appeals were taken by all the defendants from judgments in favor of plaintiff to the Court of Appeals, and in that court the cases were submitted together, the questions involved being the same in all, and that court rendered an opinion in only one of them, disposing of the others by memorandum opinions referring for their rulings to the opinion in the one case, and that opinion is quashed on *certiorari* as being in conflict with the prior rulings of this court, the judgments in the other cases will also be quashed upon *certiorari*.

Certiorari.

JUDGMENT QUASHED.

Bruce Barnett and Doyle C. McDonough for relator.

Lathrop, Morrow, Fox & Moore, Charles M. Howell
and *Joseph S. Brooks* for respondents.

WALKER, J.—Relator seeks by *certiorari* to quash the judgment of the Kansas City Court of Appeals in the case of Terminal Ice & Power Company, appellant, v. The Security Insurance Company, respondent. The Terminal Ice & Power Company had brought suit on policies of fire insurance against several companies, among others the relator and the American Fire Insurance Company. After judgments in favor of plaintiff the cases were appealed to the Kansas City Court of Appeals, where the judgments were reversed and the cases remanded. [187 S. W. 564.] The cases were submitted together, the questions involved being the same in all. The opinion of the Court of Appeals was rendered in the case against the American Fire Insurance Company and was applicable in its reasoning and conclusions to the other cases. Each of the other cases was disposed of by a memorandum opinion referring for its ruling to the American Fire Insurance Company case. In a *certiorari* proceeding in this court the judgment of the Kansas City Court of Appeals in that case was quashed. [State ex rel. v. Ellison, 269 Mo. 410.] It therefore follows that the judgment of the Kansas City Court of Appeals in the instant case should be quashed for the reasons stated in our opinion in the American Fire Insurance Company case. It is so ordered. All concur except *Bond, J.*, not sitting.

THE STATE ex rel. CHESTER, PERRYVILLE &
STE. GENEVIEVE RAILWAY COMPANY v.
BERT TURNER et al., Appellants.

In Banc, February 13, 1917.

1. **APPELLATE PRACTICE:** Certification from Court of Appeals. A case certified to the Supreme Court by a Court of Appeals on the ground that its decision therein is in conflict with a decision of another Court of Appeals in another case, stands for final decision and judgment, just as if it had been appealed directly to the Supreme Court from the circuit court.
2. **CIRCUIT CLERK:** Negligence in Filing Bill of Exceptions: Damages. To justify a recovery of damages against a circuit clerk and his bondsmen for his failure to properly file a bill of exceptions delivered to him by the losing party who has appealed from a judgment rendered against him in the circuit court, such losing party must show actionable negligence on the part of the clerk and consequent damages.
3. ———: Filing Bill of Exceptions. When the circuit clerk accepted and deposited with other papers in the cause in his office the bill of exceptions delivered to him by appellant to be filed, the act of filing was complete, although he failed to subscribe on the bill itself any written notation of the act of filing done by him. Such notation would have been full evidence of the fact recited by it, but the fact of filing existed independently of that particular method of proving it.
4. ———: ———: Damages for Failure to Obtain Reversal. Notwithstanding the fact that the Court of Appeals, to which defendant appealed from a judgment rendered against it in the circuit court, held that no bill of exceptions had been filed and affirmed the judgment upon a consideration of the record proper only, and defendant afterwards paid that judgment, defendant cannot recover in a suit for damages against the circuit clerk and his bondsmen for negligently failing to file such bill of exceptions, if the bill was delivered to the clerk within the time fixed by the order of the court and he accepted it and placed it among the papers in the cause in his office, for the act of filing was complete, although the clerk did not mark it filed and made no entry on the court record showing it had been filed. [Approving *State ex rel. Railroad v. Turner*, 177 Mo. App. 1. c. 464, and disapproving *Callier v. Railroad*, 158 Mo. App. 249.]

Held, by GRAVES, C. J., dissenting, with whom WALKER and WOODSON, JJ., concur, that the general rule that the deposit of a bill of exceptions with the circuit clerk and an acceptance thereof by him is a filing of such bill, is a rule which he cannot invoke, but is for the protection of the party depositing the bill, established in order that such party may not be injured by the negligence of the clerk; that it was negligence of the clerk not to mark the bill filed, and as he did not do that, or make any entry on the court records showing its filing, the record could not be corrected by a *nunc pro tunc* entry, and the Court of Appeals was authorized in holding the record showed no filing of the bill; and the clerk should be held liable for damages to the extent of the judgment which defendant has been compelled to pay because of his neglect of an imposed duty.

Appeal from Mississippi Circuit Court—*Hon. Frank Kelly*, Judge.

REVERSED.

J. L. Fort and *T. R. R. Ely* for appellants.

(1) The sureties guaranteed that the clerk would perform the duties of his office "according to law," but they did not guarantee that he would perform them "according to the rules and customs of courts of last resort." A law is an act, enactment, ordinance, or statute, prescribed by the legislative power, as opposed to rules of civil conduct deduced from the customs of the people, or judicial precedents. 25 Cyc. 164; *Brinkerhoff v. Bostwick*, 99 N. Y. 185; *Lycoming v. Wright*, 60 Vt. 515; *State v. Tingey*, 24 Utah, 225; *Phelps v. Panama*, 1 Wash. 518; *Swift v. Tyson*, 16 Pt. 1. The decisions of courts are not the law; they are only evidence of the law. *Yates v. Lansing*, 9 Johns. 395; 25 Cyc. 164; *Falconer v. Simmons*, 51 W. Va. 172; *Baltimore v. Baugh*, 149 U. S. 368; *United States v. Harris*, 113 Fed. 27; *Phipps v. Harding*, 70 Fed. 468; *Hall v. Davis*, 100 Ind. 422. Where an officer's duties are prescribed by statute, usage will not excuse their discharge in a different manner. So proof of a custom is not permissible to enlarge the powers of officers whose authority is defined by statute. 12 Cyc. 1056; *Crocker v. Schureman*,

State ex rel. v. Turner.

7 Mo. App. 358; Walters v. Senf, 115 Mo. 524; Knox County v. Goggin, 105 Mo. 182. The rules of practice in the courts of last resort in this State may require the entry of the filing of the bill of exceptions in the "vacation record" of the court, but such rules do not constitute any part of the law of the State. State ex rel. v. Broadbuss, 207 Mo. 127. (2) It has been said that the word "filing" is generally used to describe the endorsement on a paper of the day when it is left at a public office; but the filing is the actual delivery of the paper to the clerk without regard to any action that he may take thereon, and does not consist of the marking put on it by the clerk, but in placing it as a permanent record in the office, or case, where it belongs. Indeed the endorsement of the fact of filing is only evidence that such filing has been made. Lent v. Co., 130 N. Y. 504; Jones v. Wells, 3 Tex. App. 94; Grubbs v. Cones, 57 Mo. 83; State v. Hockaday, 98 Mo. 590; Vettison v. Budd, 21 Ark. 578; Jacksonville v. Walton, 42 Fla. 54; Oats v. State, 153 Ind. 436; Graham v. Summers, 25 Minn. 81; State v. Heth, 60 Kan. 560; In re Dewar, 10 Mont. 426; Bishop v. Cook, 13 Barb. 326; King v. Penn, 43 Ohio St. 57; Starkwether v. Bell, 12 S. D. 146; Franklin v. State, 24 Fla. 55; Newman v. Clayburn, 40 S. C. 549.

Giboney Houck, James F. Green and Davis & Hardesty for respondent.

(1) The entry of a circuit clerk showing the filing of a bill of exceptions in vacation has the dignity of a record and furnishes the only means of proof that the bill was filed. (a) The origin and early history of bills of exceptions clearly show that in the very nature of things a bill of exceptions could only be filed by permission of the court, and as the act of the court, evidenced by a record entry. Statute of Westminster II (13 Edw. I. c. 31); 3 Cyc. 23; Mo. Ter. Laws 1818, p. 259, sec. 46; 2 R. S. 1825, p. 631, sec. 39; Pomeroy v. Selles, 8 Mo. 727; 2 R. S. 1855, p. 1264, secs. 27 and 28; McCarty v. Cunningham, 75 Mo. 279; Spencer v. Railroad, 79 Mo.

500; State v. Duckworth, 68 Mo. 156; Brewer v. Dinwiddie, 25 Mo. 351; State ex rel. v. County Court, 51 Mo. 529; Fulkerson v. Houts, 55 Mo. 301; Johnson v. Hodges, 65 Mo. 589; La Follette v. Thompson, 83 Mo. 199. (b) Neither the Amendatory Act of 1885 nor that of 1889 modified the law on the point that the court, itself, was the sole source of authority for filing a bill in vacation, nor did these amendatory acts modify the practice of requiring a record entry in vacation, as well as in term time, for the purpose of filing a bill of exceptions. Law 1885, p. 214; R. S. 1879, secs. 3638 and 3639; Laws 1889, pp. 189-190; R. S. 1889, secs. 2168, 2170 and 2172; Craig v. Railroad, 248 Mo. 270; State v. Ryan, 120 Mo. 88; State v. Scott, 113 Mo. 559; State v. Britt, 117 Mo. 584; Ricketts v. Hart, 150 Mo. 64; Bradbury v. Kerns, 115 Mo. App. 99; State ex rel. v. Holland, 116 Mo. App. 345; Reynolds v. Schade, 131 Mo. App. 1; Williams v. Williams, 26 Mo. App. 408; La Follette v. Thompson, 83 Mo. 199; Ferguson v. Thatcher, 79 Mo. 511; Fulkerson v. Houts, 55 Mo. 302; Pope v. Thompson, 66 Mo. 661; Hayden v. Alkire Gro. Co., 88 Mo. App. 241; R. S. 1909, secs. 2029, 2031 and 2033; Johnson v. Hodges, 65 Mo. 589. (c) The doctrine of *stare decisis* precludes this court from changing its construction of the law covering the filing of bills of exceptions. Graham v. Conway, 91 Mo. App. 391; Fulkerson v. Houts, 55 Mo. 301; Johnson v. Hodges, 65 Mo. 589; State v. Ryan, 120 Mo. 88; Handlin v. Morgan County, 57 Mo. 116; Pennowfsky v. Coerver, 250 Mo. 37; Lawson v. Mills, 150 Mo. 429; Storage Co. v. Glasner, 150 Mo. 428; Butler County v. Graddy, 152 Mo. 443; Bick v. Williams, 181 Mo. 527; Ricketts v. Hart, 150 Mo. 68; Goodson & Wright v. Bevan, 89 Mo. App. 162; Wilson v. Railroad, 167 Mo. 323; La Follette v. Thompson, 83 Mo. 199; Allen v. Funk, 85 Mo. App. 460; Ferguson v. Thatcher, 79 Mo. 511; Jaco v. Railroad, 94 Mo. App. 567; Dinwiddie v. Jacobs, 82 Mo. 195; Hamilton-Brown Shoe Co. v. Williams, 91 Mo. App. 511; St. Charles ex rel. v. Deemar, 174 Mo. 122; Railroad v. Wyatt, 223 Mo. 347; Alt v. Dines, 227 Mo. 418; Hill

State ex rel. v. Turner.

v. Butler Co., 195 Mo. 511; Hodson v. McAnerney, 168 Mo. App. 385; Laws 1911, p. 139. (d) The Springfield Court of Appeals cites no cases which require this court to declare the law otherwise than as above indicated and contended for by respondent. Baker v. Henry, 63 Mo. 517; Fulkerson v. Houts, 55 Mo. 301; Johnson v. Hodges, 65 Mo. 589; State v. Ryan, 120 Mo. 88; Pullis v. Summerville, 218 Mo. 624; R. S. 1909, sec. 2001; Bensley v. Haberly, 20 Mo. App. 648; R. S. 1879, secs. 293, 294, 296, 298, 299; State v. Pieski, 248 Mo. 715; Dorrance v. Dorrance, 242 Mo. 625; Ferguson v. Thatcher, 79 Mo. 511; Carter v. Prior, 78 Mo. 222; Bower v. Daniel, 198 Mo. 289; St. Charles ex rel. v. Deemar, 174 Mo. 122; Pennowsfky v. Coerver, 205 Mo. 137. (2) The decision of the St. Louis Court of Appeals in the Callier case in question (158 Mo. App. 249) governs the case at bar. (a) In the first place, because it declares the law as it now is. In support of this proposition we cite all the authorities and all the arguments under point one. (b) In the second place, because the decision of the St. Louis Court of Appeals followed the then last controlling decision of the Supreme Court, and became the law of the case at bar for all purposes. Constitution, art. 6, Amendment of 1884; Shelby Co. Ry. v. Crow, 137 Mo. 461; Dorrance v. Dorrance, 242 Mo. 625; State v. Pieski, 248 Mo. 715; State v. Ellison, 181 S. W. 78, State ex rel. v. Ellison, 181 S. W. 998; State v. Ellison, 187 S. W. 23. (c) In the third place, because the clerk's failure to make the entry and then falsely certifying that he had made the entry, was the proximate cause of this very decision of the St. Louis Court of Appeals. R. S. 1909, secs. 2029, 2685; State ex rel. v. O'Gorman, 75 Mo. 379; Howard v. United States, 102 Fed. 77; Callier v. Railroad, 158 Mo. App. 249. And he can't invoke any rule that a mere depositing constitutes a filing as to him. State ex rel. v. Dickman, 124 Mo. App. 659; Collins v. Daniel, 66 Ga. 203; Norman v. Vanderburg, 157 Mo. App. 488; Weedon v. Railroad, 78 Fed. 591. Nor can his bondsmen invoke any defense not available to him. Boone Co. v. Jones, 54 Iowa, 709; 29 Cyc. 1465.

BOND, J.—I. The suit of Rean Callier against the Chester, Perryville & Ste Genevieve Railway Company for personal injuries was tried in the circuit court of Dunklin County, of which Bert Turner was clerk, and judgment rendered against the defendant railway company, which was affirmed by the St. Louis Court of Appeals upon a consideration only of the record proper, and thereupon paid by the said railroad, which now seeks redress on the clerk's official bond because of his failure properly to file the bill of exceptions, which negligence and failure of duty, it is alleged, deprived it of its right to have its appeal heard upon its bill of exceptions in the appellate court. The relator further claims that, had said bill of exceptions been properly filed, the said appellate court would have reversed the judgment against it; that the appellate court affirmed the judgment on the record proper, thereby compelling relator to pay the amount of the judgment and costs and suffer the further loss of expenses and attorneys' fees incurred in perfecting the appeal.

In the instant case the relator, in order to support its theory, presented to the trial court and presents to this court, the entire record of the Callier case, including the bill of exceptions presented to and rejected by the St. Louis Court of Appeals.

Relator also put in evidence the opinion of the St. Louis Court of Appeals in the Callier case, to show that the appellate court held that there was no record entry, minute, notation or memorandum in the records of the circuit court that the bill of exceptions had ever been filed and therefore refused to consider the bill of exceptions as a part of the files of the case, and affirmed the judgment on the record proper.

The contention of the relator in this regard is, that if through the fault of the clerk the bill of exceptions was not properly filed and no such record of the filing thereof made as would present the Callier bill of exceptions to the St. Louis Court of Appeals for consideration, and if reversible error was shown by such bill, then the trial court should, and now this court must, hold that the

St. Louis Court of Appeals, except for the gross negligence of the clerk would have reversed the judgment (which was affirmed on the record proper) and thereby relator would not have been compelled to pay said judgment.

On the other hand, the defendants contend that there was no reversible error shown by the bill of exceptions and that its consideration by the appellate court would not have changed their ruling; but even conceding that it would have made a difference in their decision, at most the case would only have been reversed and remanded, and in the event of another trial Callier would, in all probability, have recovered as large, if not a larger, judgment, and therefore relator was not damaged.

The trial court, however, took relator's view of the case, rendered judgment for the penalty of the bond and awarded execution for \$6251.87. The defendants appealed.

At the time the appeal was taken Mississippi County was a part of the district of the Springfield Court of Appeals and hence the cause was sent to that court, which reversed the judgment, holding that the bill of exceptions in the Callier case had been legally filed. In conclusion the Springfield Court of Appeals, on account of its decision being in conflict with that of the St. Louis Court of Appeals, certified the cause to this court for final determination.

II. This case has reached us in the way provided in the Constitution to cause harmony in the rulings of the two courts of appeal and stands for final decision and judgment here as if it had been appealed direct to this court from the circuit court of Mississippi County.

To justify a recovery in this action it was essential that plaintiff should show actionable negligence of the clerk and consequent damage to it. The burden of proving these two indispensable elements to any judgment against the defendants was cast upon plaintiff by law and was properly assumed in its pleadings. The question, therefore, which dominates the case is: was there any actionable negligence attributable to the clerk on account

State ex rel. v. Turner.

of his acts and doings in and about the bill of exceptions which was delivered to him for filing by plaintiff?

The facts are undisputed and, in effect, are that after procuring an order of court entered of record permitting it to file a bill of exceptions within a stated time, in vacation, plaintiff prepared such bill of exceptions and transmitted it to the office of the clerk where it was received and deposited and a note of acknowledgment sent to plaintiff's attorney in the form of a signed written statement (which had been inclosed for signature when the bill of exceptions was sent) to the effect that the bill of exceptions was filed within the currency of time extended by the order of record of the judge of the court before its adjournment. The clerk did not, in fact, indorse any writing indicating its filing on the bill of exceptions; he simply kept the bill of exceptions with the papers in the case in his office.

For the reasons given in the opinion of the Springfield Court of Appeals, we think when the clerk accepted and deposited with the other papers in the cause in his office, the bill of exceptions delivered to him to be filed, the act of filing was complete, although he failed to subscribe on the bill itself any written notation of the act of filing done by him. Such writing would have been full evidence of the fact recited by it, but the fact existed independently of that particular method of proving it. It would have been a perfect performance of his duty if the clerk had made a notation of its filing in writing on the bill; but having actually filed it, under the conceded acts, the omission to make a record of his act did not destroy the act itself, but merely affected the method of its proof. [State ex rel. Railroad v. Turner, 177 Mo. App. l. c. 464 et seq., and cases cited.]

III. The point is made that there is something in the nature of a bill of exceptions which takes it out of the rule governing the filing of other papers or proceedings in a cause, as to all of which it is not denied that the filing might be manifested by the proper physical act, irrespective of any written evidence or indorsements.

**Damages
for Failure
to File Bill.**

It is difficult to perceive any intrinsic quality in a bill of exceptions distinguishing it from a pleading, a verdict or process, all of which are parts of the record proper. Yet it is undeniable that these may be filed by the manual act of the clerk without the marking of a written indorsement on any of them.

It follows that the bill of exceptions was filed in the legal sense of that term when it was delivered to the defendant clerk, or his deputy, at his office for filing in accordance with the terms of the court's order providing for its filing in vacation and was received and deposited with the papers in that case, although the bill itself contained no written notation of the act and date of its filing. It necessarily results that no actionable negligence on the part of the defendant clerk was shown and that this suit on his official bond must fail.

The similar views of the Springfield Court of Appeals expressed in its decision of this case (177 Mo. App., *supra*) are approved, and the conflicting views of the St. Louis Court of Appeals in the case of *Callier v. Railroad*, 158 Mo. App. 249, are disapproved and the judgment of the circuit court of Mississippi County is reversed.

Blair, J., concurs; *Graves, J.*, dissents in separate opinion, in which *Woodson, J.*, joins. Cause transferred to Court in Banc.

PER CURIAM:—The foregoing opinion of *BOND, J.*, is adopted In Banc as the opinion of the court; *Faris, J.*, concurs in the result; *Blair* and *Williams, JJ.*, concur; *Graves, C. J.*, dissents in a separate opinion; *Walker* and *Woodson, JJ.*, dissent, and concur with *Graves, C. J.*

GRAVES, C. J. (dissenting)—I do not concur in the views of my learned brother *BOND*, in this case. I concede the general rule that the deposit of an instrument with an officer whose duty it is to file such instrument, is usually a filing of such instrument to all intents of the law. But the neglect to file such an instrument in due form by such officer is a neglect of duty. The rule which says that the deposit thereof with such officer shall be deemed a

filing is one of necessity, and is one which can only be invoked by the party depositing it for filing. By this I mean the party depositing the instrument for filing, can say that it is no fault of his that it has not been filed, and he cannot be denied the benefits accruing from an actual filing. This is the rule for the reason that the negligence of the officer shall not be held to prejudice the rights of one who in good faith has done all that is required of him for a timely filing. But this rule is totally foreign to the case at bar. Here we have the clerk himself invoking the rule, and asking that the bill of exceptions be considered as filed, although he has negligently failed to file it.

The doctrine announced by my brother is a dangerous one. The clerk could refuse to properly file every bill of exceptions, but place them with the files, and thus defeat all applicants, or at least force them to a hearing in the appellate court upon the record proper. Under the law and rules of court the record proper, upon appeal, must show the filing of a bill of exceptions, or that document is not before the appellate court for review. In the case at bar it appears that in the case of *Callier v. Railroad*, 158 Mo. App. 249, the clerk neither made a record entry showing the filing of a bill of exceptions, nor did he make in his office or on the bill of exceptions any written memorandum from which the circuit court could rightfully make a *nunc pro tunc* entry of such filing. It is this neglect of the clerk which is the basis of this suit against him and his bondsmen. That he was grossly guilty of negligence in his office clearly appears. That such negligence precluded the railroad from a hearing clearly appears. Under such circumstances the clerk can't invoke the rule that the deposit of the bill of exceptions was a filing. He can never invoke that rule to cover his own neglect or negligence. Such rule of necessity has no application to him. Such rule can only be invoked by one who would be injured by the neglect of the office. It cannot be invoked to excuse the negligence of the officer in a suit based on such negligence.

My brother and the Springfield Court of Appeals have misapplied the rule. Stated otherwise they have invoked a rule which has no application. On the record be-

State v. Sisson.

fore it the St. Louis Court of Appeals in *Callier v. Railroad*, 158 Mo. App. 249, was right in holding that there was no bill of exceptions before them, and further right in holding that there was no written memoranda from which a *nunc pro tunc* entry could be made by the circuit court. I therefore dissent. *Walker and Woodson, JJ.*, concur in these views.

THE STATE, Appellant, v. RUPERT SISSON and
HOMER GRANGER.

Division Two, February 17, 1917.

1. **FORGERY: Counterfeiting: Trading Stamps.** Trading stamps having on them the words: "Eagle: Stamp of Value 10; Reg. in U. S. Pat. Off." do not on their face purport to be the pecuniary obligation of anybody, and the making or uttering of them does not constitute counterfeiting or forgery under Sec. 4651, R. L. 1909.
2. ———: ———: ———: **Pecuniary Obligation.** If the trading stamps bearing the word "Eagle" do not purport to be the pecuniary obligation of any one and do not of themselves constitute a pecuniary obligation of some one, an information charging forgery cannot supply these necessary elements by charging that a private company is under agreement to pay two dollars a thousand for "Eagle Trading Stamps" when presented in a certain way.

Appeal from the St. Louis City Circuit Court—*Hon. Daniel D. Fisher*, Judge.

AFFIRMED.

Frank W. McAllister, Attorney-General, for the State.

Clark & S'Renco for respondents.

ROY, C.—Defendants were charged by information with having in their possession and with uttering certain

counterfeit and forged Eagle Trading Stamps. A demurrer to the information was sustained, and the State has appealed.

The first count of the information contains the following:

"That on or about April 28, 1915, and for many years prior thereto, David May, Moses Schoenberg, Louis D. Schoenberg, Isaac H. Lesem and H. August, executor of the estate of Joseph E. Schoenberg, deceased, were co-partners, doing business under the name and style of "Eagle Trading Stamp Company" and in the due and regular course and pursuance of such business, issued to merchants in the city of St. Louis and elsewhere, printed instruments known as 'Eagle Trading Stamps,' which were of the general tenor and effect as follows:

(Here are pasted four stamps in a row, all alike).

"That said merchants purchase said Eagle Trading Stamps from said Eagle Trading Stamp Company, and as an incentive and inducement to trade, issued said stamps to their customers in numbers proportionate to amounts of purchases by the respective customers.

"That said Eagle Trading Stamp Company promised, agreed and bound themselves to pay and for many years has paid the sum of two dollars in cash to anyone who would present to said co-partnership one thousand of said Eagle Trading Stamps, pasted in a certain paper booklet or pamphlet, which booklets or pamphlets were issued by said Eagle Trading Stamp Company and were distributed free to the public.

"That by virtue of the promises, said Eagle Trading Stamps, so executed and issued by said Eagle Trading Stamp Company, were instruments, being and purported to be the acts of said co-partners, doing business under the name and style of Eagle Trading Stamp Company, by which a pecuniary demand upon, and an obligation of said co-partners, was and purported to be created.

"That Alfred J. Manuel, Rupert Sisson, Clifford White and Homer Granger, in the city of St. Louis, Missouri, on or about the 28th day of April, 1915, unlawfully and feloniously did have in their possession and custody,

with felonious intent to cheat and defraud by uttering and passing the same as true and genuine, certain false, forged and counterfeit Eagle Trading Stamps which said trading stamps were then and there instruments purporting to be the acts of said Eagle Trading Stamp Company, by which a pecuniary demand upon, and a pecuniary obligation of, said Eagle Trading Stamp Company was created; which said false, forged and counterfeit trading stamps and instruments are of the following tenor, to-wit:

(Here are pasted four stamps in a row, all alike)

"They the said Alfred J. Manuel, Rupert Sisson, Clifford White and Homer Granger, then and there well knowing the said trading stamps to be falsely made, forged and counterfeited; against the peace and dignity of the State."

The second count charges the uttering of those stamps.

All those stamps have on them the words and figures as follows:

Eagle
Stamp of value
10

Reg. in U. S. Pat. Off.

There are no words on those stamps which, in themselves, create a pecuniary obligation on the part of any one.

The information was evidently filed under section 4651, Revised Statutes 1909, which reads as follows:

"Every person who, with intent to injure or defraud, shall falsely make, alter, forge or counterfeit any instrument or writing, being or purporting to be the act of another, by which any pecuniary demand or obligation shall be or purport to be transferred, created, increased, discharged or diminished, or by which any rights or property whatsoever shall be or purport to be transferred, conveyed, discharged, increased or in any manner affected, the falsely making, altering, forging or counterfeiting of which is not hereinbefore declared to be a forgery in some other degree, shall, on conviction, be adjudged guilty of forgery in the third degree."

Those stamps do not on their face purport to be the pecuniary obligation of anybody. They do not of themselves constitute such pecuniary obligations of any person. The information seeks to supply such necessary element of the charge by the allegation that the Eagle Trading Stamp Company is under agreement to pay two dollars a thousand for those stamps when presented in a certain way. That obligation of the Eagle Trading Stamp Company does not appear on the face of the stamps.

1 Bishop's New Criminal Law (8th Ed.), section 572, defines forgery at common law thus: "It is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability."

So far as we are able to discover those stamps are not the subject of forgery, either at common law or under any statute of this State.

The judgment is affirmed.

White, C., concurs.

PER CURIAM:—The foregoing opinion of Roy, C., is adopted as the opinion of the court. All of the judges concur.

**NORMAN'S LAND & MANUFACTURING COMPANY,
Appellant, v. STEPHEN B. HUNTER and AL-
FRED L. HARTY.**

Division One, February 20, 1917.

1. **SHERIFF'S DEED: Unacknowledged: Sale by Purchaser: Relation.**
The grantee of the purchaser at a tax sale who conveyed by a deed recorded before the sheriff had acknowledged his deed to him, took the title, as against a subsequent grantee of said purchaser with constructive notice. As to the purchaser at the tax sale, the sheriff's deed, upon its subsequent acknowledgment, related back to the day of sale; and the purchaser's deed to his first grantee took priority over a subsequent deed made by him after his first deed and the sheriff's deed had been recorded.

Land & Mfg. Co. v. Hunter.

2. ———: **Vendible Interest.** The purchaser at a sheriff's sale acquires an interest which is vendible even prior to the acknowledgment of the sheriff's deed; and a sale by him and the title which his grantee acquires cannot be affected by subsequent attempt of such purchaser to again convey the land to another grantee; and the vendible character of his interest is not affected by the fact that after he had parted with his right to demand a deed from the sheriff the sheriff acknowledged his deed, his own deed and the sheriff's deed both being recorded before he attempted to convey to others, constructive notice being thereby given.

Appeal from Mississippi Circuit Court—*Hon. Frank Kelly*, Judge.

AFFIRMED.

Ernest A. Green for appellant.

The quitclaim deed made by Jones on October 1, 1887, to Bradley and Dillon, prior to the time the sheriff's deed to him had been acknowledged, was void and ineffectual to convey any title whatever to the defendants' grantors. Accordingly, defendants have no title to the lands in controversy and judgment should have been rendered decreeing title in the plaintiff. 1 Cyc. 560; *Coal Co. v. Bates*, 146 Ky. 624; *Chadwick v. Carson*, 78 Ala. 116; *Balkum v. Wood*, 58 Ala. 642; 1 *Corpus Juris.*, pp. 749, 813, 814; *Ryan v. Carr*, 46 Mo. 483; *Allen v. Moss*, 27 Mo. 354; *Dunlap v. Henry*, 76 Mo. 108; *Adams v. Buchanan*, 49 Mo. 64; *Cabell v. Grubbs*, 48 Mo. 353; *Ford v. Unity Church Society*, 120 Mo. 498.

Russell & Deal and *Wammack & Welborn* for respondents.

Plaintiff cites a number of cases, all of which simply hold that a sheriff's deed, not acknowledged according to law, is void. This is the law as held in the cases cited. A sheriff's deed never acknowledged as provided by law, is void, but that is not the point in this case. The point in this case is at what time a sheriff's deed, properly acknowledged, takes effect, and upon this propo-

sition our Supreme Court has uniformly held that when a sheriff's deed is properly acknowledged it relates back to the sale, and takes effect as of that date, as to the defendant in the execution and his privies, and as to strangers purchasing with notice, and vests the title in the execution purchaser from that time. *Leach v. Cohen*, 55 Mo. 451; *Fleckenstein v. Baxter*, 114 Mo. 493; *Strain v. Murphy*, 49 Mo. 337; *Ozark Lbr. Co. v. Franks*, 156 Mo. 673; *Bush v. White*, 85 Mo. 339; *Porter v. Mariner*, 50 Mo. 368; *Crowley v. Wallace*, 12 Mo. 148; *Boyd v. Ellis*, 107 Mo. 401; *Land & Lumber Co. v. Franks*, 156 Mo. 689; *Howard v. Brown*, 197 Mo. 48; *Griffin v. Franklin*, 224 Mo. 683; *Mason v. Perkins*, 180 Mo. 107. Such a deed when properly executed is held to take effect as of the date of the sale under the doctrine of relation. This doctrine is that when several acts are necessary to consummate a conveyance, the conveyance when finally completed will be held to take effect as of the date of the first of the acts in the making of the conveyance. *Block v. Morrison*, 112 Mo. 356.

BLAIR, J.—On change of venue to Mississippi County, judgment went for defendants in a suit to quiet title to certain Stoddard County lands. This appeal followed. The undisputed facts are that the tract was sold under a tax judgment on September 5, 1887. At this sale Ligon Jones bought. The sheriff's deed to him was dated September 6, 1887, acknowledged March 10, and recorded March 12, 1888. In the meantime, October 1, 1887, Jones executed and delivered to Bradley and Dillon, defendants in the tax judgment under which he had bought, a quit-claim deed to the land. This was recorded the day of delivery. It contained the usual quit-claim recitals and the following: "The title hereby conveyed is that obtained by sheriff's tax deed, dated September 6, 1887." Respondents claim, through mesne conveyances, under Bradley and Dillon. *June 8, 1906*, Jones executed a warranty deed to Walter Phelan, under whom appellant claims. This deed was recorded September 7, 1907.

Appellant contends Jones' quit-claim deed of October 1, 1887, conveyed nothing; that Jones had nothing to convey until the sheriff's deed was acknowledged; that when that deed was acknowledged Jones's power to convey first arose and the deed of June 8, 1906, passed title to Phelan.

I. Appellant relies upon decisions (*Ryan v. Carr*, 46 Mo. l. c. 486; *Allen v. Moss*, 27 Mo. l. c. 364; *Dunlap v. Henry*, 76 Mo. l. c. 108; *Adams v. Buchanan*, 49 Mo. 64; *Cabell v. Grubbs*, 48 Mo. 353 and texts which **Sheriff's Deed.** announce the rule that title does not pass by sheriff's deed and it is ineffectual as an instrument until it is acknowledged. The cases cited involved the legal title and the rule was applied to deeds unacknowledged when offered in evidence.

Respondents rely upon the doctrine of relation. This doctrine is "that where there are divers acts concurrent to make a conveyance, estate or other thing, the original act shall be preferred, and to this the other acts **Relation.** shall have relation." [*Crowley v. Wallace*, 12 Mo. l. c. 147.] In that case a sheriff's deed acknowledged after suit brought was held admissible to show legal title in plaintiff from the date of the execution sale which occurred prior to the institution of the action. It was held the deed took effect, by relation, from the date of the sale and was admissible. The same rule has been frequently applied. [*Porter v. Mariner*, 50 Mo. l. c. 368; *Boyd v. Ellis*, 107 Mo. l. c. 401; *Bush v. White*, 85 Mo. l. c. 358; *Mason v. Perkins*, 180 Mo. l. c. 707.] This doctrine is applied as against the execution defendant and his privies and strangers who purchase with notice. [*Land & Lumber Co. v. Franks*, 156 Mo. l. c. 689.] It has been held that a recorded deed, executed by one who has no title but who afterward acquires title by recorded deed, lies outside the chain of title of those claiming under him by subsequent conveyance, and such first deed is not constructive notice to the purchaser in good faith. (*Ford v. Unity Church Society*, 120 Mo. l. c. 514), but

the rule is not applicable to this case. Appellant claims under Jones and his title depended upon the tax sale. Necessarily it took with notice of that. [Fleckenstein v. Baxter, 114 Mo. l. c. 496.] As against Jones the sheriff's deed, upon its acknowledgment in 1888, well may be held to have related to the date of the sale. After its acknowledgment he could not have disputed the title of Bradley and Dillon. Appellant claims under him and stands in his shoes with notice of the tax sale and acknowledged sheriff's deed and of the applicable law, including, in this case, the doctrine of relation. That this doctrine is applicable in circumstances like those in this case is directly supported by what is said in Howard v. Brown, 197 Mo. l. c. 48, 49. It is suggested what was there said is *obiter*. The court both applied the doctrine and held Brown had not put himself in position to raise the question. Whether *obiter* or not it gives expression to the correct rule. The cases of Chadwick v. Carson, 78 Ala. 116; Balkum v. Wood, 58 Ala. 642, and Northern Coal & Coke Co. v. Bates, 146 Ky. 624, are cited, but contain nothing out of harmony with the above views.

II. Another ground which supports the judgment is that by purchasing at the sheriff's sale Jones acquired an interest which was vendible even prior to the acknowledgment of the sheriff's deed. Appellant's authorities are chiefly those decided prior to the amendment of the statute relating to sheriff's sales. That amendment was enacted in 1887 (Laws 1887, pp. 186, 187) and added to section 2400, Revised Statutes 1879, provisions which remain as then enacted (Sec. 2239, R. S. 1909) and which contain a conclusive implication that the purchaser at the sheriff's sale takes an interest which he can sell or devise or which may descend to his heirs. Having taken such a right or interest, Jones sold it to Bradley and Dillon and their title and that of those who claim under them could not be affected by an attempt of Jones again to convey the property. The fact the sheriff's deed was made to Jones after he had parted with his right to demand it does not affect the question. Phelan, grantee of Jones in the

**Purchaser
at Sheriff's
Sale.**

deed of June 8, 1906, and under whom appellant claims, had constructive notice of the tax sale, it being in his chain of title, which is appellant's also. That included notice of the fact that the sale gave Jones a vendible right. Notice that he had such a right carried with it constructive notice of the deed of October 1, 1887.

The judgment is affirmed. All concur.

CHARLES C. PETERSON v. UNITED RAILWAYS
COMPANY, Appellant.

Division One, February 20, 1917.

1. **PRACTICE IN SUPREME COURT:** Certification from Court of Appeals. A case certified from a Court of Appeals, upon certification that the majority opinion therein conflicts with certain cases of the Supreme Court, is for full review.
2. **NEGLIGENCE: Vigilant Watch Ordinance: Not in Abstract.** Whether or not an instruction permits a recovery against a street railway company if the conductor of the car failed to keep a vigilant watch for vehicles on the track, in violation of a city ordinance, and is for that reason erroneous, or whether or not the ordinance applies only to motormen, will not be decided, if the ordinance is not preserved in the printed abstract. Courts cannot take judicial notice of municipal ordinances, however great the municipality.
3. ———: **Ringin Bell or Sounding Gong: Proximate Cause.** Where both plaintiff and his driver saw and knew of the approaching street car when it was six hundred feet from the place where their automobile was stalled on the track, the failure to give notice of the approach of the car by sounding the gong or otherwise was not the proximate cause of plaintiff's injury caused by the street car striking the automobile, and an instruction basing his right to recover upon such failure is error. The purpose of sounding the gong is to give notice of the car's approach, and if the injured party on the track has actual timely knowledge of its approach, without such sounding, failure to sound the gong cannot be the proximate cause of his injury.

Appeal from St. Louis City Circuit Court.—*Hon. George C. Hitchcock*, Judge.

REVERSED AND REMANDED.

Boyle & Priest and *T. E. Francis* for appellant.

(1) Plaintiff's instruction number 1 is erroneous, because it permitted a recovery by plaintiff if the jury found that the conductor failed to keep a vigilant watch, as required by the so-called "Vigilant Watch Ordinance" of St. Louis, when, under the law, a recovery could be had only in the event the motorman failed to keep such lookout. *Gebhardt v. Transit Co.*, 97 Mo. App. 373; *Heinzle v. Railroad*, 182 Mo. 528. (2) Plaintiff's instruction number 1, which authorized the jury to find for plaintiff if they found that defendant's agents in charge of the car "failed to ring the bell or gong on said car or give other audible notice or warning of the approach of said car," is erroneous, for the reason plaintiff testified that he was fully cognizant of the approach of the car, and, therefore, the failure to ring the bell or gong or give him other warning of its approach was not the proximate cause of the collision and could not properly be made a predicate of a recovery. *Murray v. Transit Co.*, 176 Mo. 183; *Haller v. St. Louis*, 176 Mo. 606; *Hutchinson v. Railroad*, 195 Mo. 546; *Heintz v. Transit Co.*, 115 Mo. App. 667; *Heinzle v. Railroad*, 182 Mo. 525; *Mockowik v. Railroad*, 196 Mo. 550; *Young v. Railroad*, 227 Mo. 307.

Willis H. Clark for respondent.

(1) The total inadequacy of the purported abstract herein precludes a determination of the first of the two points attempted to be raised in the brief for appellant. *Peterson v. United Railways*, 183 Mo. App. 715. (2) The failure to give any signal of the approach and passage of the car, under the circumstances disclosed in evidence, was a factor of negligence on the part of defendant which plaintiff was entitled to have submitted to the jury for

Peterson v. United Railways.

their decision as to the cause of the accident. *McKinzie v. United Railways*, 216 Mo. 1; *Kinler v. Railway Co.*, 216 Mo. 145; *Dahmer v. Railway Co.*, 136 Mo. App. 443; *Bilhimer v. Railway Co.*, 137 Mo. App. 675; *Batsch v. Railway Co.*, 143 Mo. App. 58; *Parrish v. Railway Co.*, 140 Mo. App. 700; *Williams v. Railway Co.*, 149 Mo. App. 489; *Ellis v. Railway Co.*, 234 Mo. 657; *Legg v. Railway Co.*, 154 Mo. App. 290; *Smith v. Railway Co.*, 169 Mo. App. 610; *Clover v. Railroad*, 149 Mo. App. 413; *Cytron v. Transit Co.*, 205 Mo. 692. (2) In the absence of a showing that specific objections were made to the instructions in the court below as to the particulars here complained of the judgment should be affirmed. *Kirby v. Lower*, 139 Mo. App. 677; *Ilgenfritz v. Railroad*, 155 S. W. 854.

GRAVES, J.—This case reaches us from the St. Louis Court of Appeals upon due certification to the effect that the majority opinion therein conflicts with the cases of this court, and other appellate decisions. The case is therefore here for full review. The petition is thus summarized in the abstract of record:

“Plaintiff’s petition alleged, in substance, that defendant is and was on May 15, 1910, a corporation engaged in the business of operating a street railway system in the city of St. Louis; that on said date plaintiff was a passenger in an automobile which became stalled on defendant’s southwestward-bound track on Gravois Avenue in said city; that while said automobile was so stalled upon said track, one of defendant’s cars, operated upon said track and in charge of a motorman and conductor, collided with said automobile, thereby inflicting certain injuries upon plaintiff, for which he prayed judgment in the sum of \$25,000.”

The assignments of negligence set forth in the petition are as follows:

“First: The employees and servants of defendant in charge of said car carelessly and negligently failed and omitted to observe and comply with the provisions of said section 1865, in that they caused and permitted

said car, immediately prior and down to the time of such collision, to be propelled along and upon said street railway track on said Gravois Avenue, within said outer district, for a distance of more than three hundred feet and to the point of such collision, at a speed greater than the rate of fifteen miles per hour and at a higher and dangerous rate of speed, to-wit, twenty-five miles per hour, whereby plaintiff, being a passenger in said automobile vehicle so upon said street and track, was placed in a situation of great and extreme danger and was prevented from removing therefrom in time to avoid such injury and damage by any act on his part.

“Second: Said employees and servants of defendant, at such time and place and while said car was approaching the point of such collision, carelessly and negligently failed and omitted to observe and comply with the provisions of said section 1864, in that they failed to keep a vigilant watch for vehicles and persons on foot on or moving towards said track, said vehicle in which plaintiff was so a passenger being then and there upon said track and in plain view of said employees and servants of defendant, and by the keeping of such vigilant watch could and would have been observed by such employees and servants in time to have enabled them to prevent and avoid such collision.

“Third: Said employees and servants of defendant at such time and when said car was within about sixty feet of said automobile vehicle discovered the same upon said track and in danger of being struck by said car, and said employees and servants then and there carelessly and negligently failed and omitted to observe and comply with the provisions of said section 1864, in that upon first so discovering the appearance of such danger to said vehicle and plaintiff as a passenger therein they failed and omitted to stop said car in the shortest time and space possible, whereas said car could then and there have been stopped or greatly reduced in speed before striking said vehicle and such danger could thus have been obviated or greatly reduced.

"Fourth: Said employees and servants of defendant immediately prior to and down to the time of such collision carelessly and negligently caused and permitted said car to be propelled upon said street railway track and along said Gravois Avenue for a distance of more than three hundred feet and to such point of such collision at a high and dangerous rate of speed, to-wit, twenty-five miles per hour, and carelessly and negligently failed and omitted to ring the bell or gong with which said car was provided or to give an other audible notice or warning of the approach or passage of said car, whereas the ringing of such bell or gong or giving of such other audible notice or warning while said car was traversing such distance would have enabled plaintiff to obviate or greatly lessen the danger to himself from such approach and passage of said car at such high and dangerous rate of speed."

Answer was a general denial and a plea of contributory negligence. Reply, a general denial. Judgment *nisi* was for plaintiff in sum of \$6000, and from such judgment this appeal was taken.

In the Court of Appeals (and the case is here upon the same briefs and record) the battle raged as to the propriety of instruction number one given for plaintiff. This instruction had best be set out, although only two clauses therein are challenged. It reads:

"If you believe and find from the evidence that on May 15, 1910, defendant was and since has been a corporation operating as a common carrier of passengers a certain line of street railways in this city, having tracks extended along and over Gravois Avenue at and near its intersection with Blow Street, said street and avenue being public highways and said point of intersection being within the outer district specified in section 1865 of ordinance 22902 of the city of St. Louis read in evidence; that on said day, about five o'clock in the afternoon, plaintiff was a passenger in an automobile proceeding northeastwardly along said Gravois Avenue; that at such time the engine of said automobile ceased to work and said automobile came to stand upon the southwest-

ward-bound track of said street railway at or near such point of intersection and in said outer district; that then and there a certain car of defendant, used and operated by defendant upon said street railway, through its motor-man and conductor in charge thereof, came southwestwardly along said track and ran against and upon said automobile with such force and violence and plaintiff was then and there thrown from said automobile and received injuries to his person and damages to his property as referred to in the evidence:

“And if you further believe and find from the evidence that such collision and injury and damage was caused by and directly due to carelessness and negligence and want of care and caution on the part of defendant (as defined in the other instructions herein), through its servants, agents or employees in charge of said car, in either of the following particulars:

“First: In failing and omitting to observe and comply with section 1865 of said ordinance 22902, read in evidence, by causing and permitting said car, immediately prior and down to the time of such collision, to be propelled along, and upon, said southwestward-bound track, within said outer district, for a distance approximating three hundred feet and to the point of such collision, at a speed greater than the rate of fifteen miles per hour and at a high and dangerous rate of speed;

“Second: In failing and omitting to observe and comply with section 1864 of said ordinance 22902, read in evidence, by failing and omitting to keep a vigilant watch for vehicles and persons on foot on or moving towards said track while said car was approaching the point of such collision;

“Third: In failing and omitting to observe and comply with section 1864 of said ordinance 22902, read in evidence, by failing and omitting to stop said car in the shortest time and space possible upon discovering, when said car was within about sixty feet of said automobile, that said automobile was upon said track and in danger of being struck by said car;

“Fourth: In failing and omitting to ring the bell or gong with which said car was provided or to give any other audible notice or warning of the approach of said car, while said car was propelled upon said track about three hundred feet to the point of such collision at a high and dangerous rate of speed;

“And if you further believe and find from the evidence that there was no carelessness or negligence on the part of plaintiff which caused or directly contributed to cause the injuries and damages referred to, then your verdict should be for the plaintiff.”

The second and fourth clauses, *supra*, are the ones challenged, the one relating to the “Vigilant-Watch” ordinance, and the other to the failure to sound the gong. The material facts can best be stated in connection with the points made.

I. The abstract of record does not set out the Vigilant Watch ordinance, nor the substance thereof. From the abstract of the pleadings and the course of the trial it is clear that it was duly pleaded and proven, but we are not enlightened as to its contents by

Ordinance: the bill of exceptions. The point made by ap-
Not in pellant, as against instruction numbered one, in
Abstract. so far as this ordinance is concerned, is that

the instruction would permit a recovery if the conductor of the car failed to keep a vigilant watch for persons upon the track, whereas the ordinance only applied to the motorman, or man actually and physically running the car. We find full authority for this complaint in *Gebhardt v. St. Louis Transit Co.*, 97 Mo. App. l. c. 383, where one of the grounds of negligence was the violation of the then “vigilant watch” ordinance of the city, and in which case an instruction was condemned and held reversible error because it included both the conductor and motorman. The court through BLAND, P. J., said:

“The third instruction given for the plaintiff told the jury that it was the duty of both the motorman and conductor to keep a vigilant lookout, etc. This was palpable error. No such duty is required of the con-

ductor. His duties are such as to call him to the rear platform and interior of the car and to give his attention to passengers on the car and to those alighting from and entering the car by way of the rear platform, and to give signals for starting and stopping the car. [Holwer-son v. Railroad, 157 Mo. 216.]”

But in the instant case we are precluded from passing upon this contention of respondent, and in oral argument here, learned counsel did not insist upon it. The record before us does not give the ordinance. We cannot take judicial cognizance of municipal ordinances, however great the municipality. Such ordinances must be pleaded, and if an appellant wants to assert error in an instruction predicated upon such ordinance, it is clearly his duty to enlighten the court by printing the ordinance or its substance, in the abstract of record. In the absence of such ordinance, we will presume the right action of the court in giving the instruction based thereon. This contention of appellant falls out of the case by reason of the abstract herein.

II. The second contention is here for review. The record is complete for its presentation and determination. Upon the part of the plaintiff the evidence shows that plaintiff was in the front seat of an automobile then operated by one Westermayer; that the automobile ran upon the street-railway track, and the engine ceasing to work, the automobile stopped upon the tracks; that he saw an approaching street car when at a distance of about 600 feet from the automobile; that it was running rapidly (20 to 25 miles per hour) on a down grade; that he saw the car and its movements up until about the time it struck the automobile; that the car was coming so fast he did not know what to do. To use his own language:

**Proximate
Cause:
Sounding
Gong.**

“I didn’t know what to do; to take a chance of jumping out of the car, or what to do; but the car was coming so fast that I didn’t get a chance. It don’t take a car long to get to you going at that rate, and I didn’t have much time to think.”

Defendant's theory of the case, as shown by its evidence, was that the automobile was running down the track toward the street car, but got off of the track into a place of safety, and then suddenly whirled back on the track in front of the street car, when the street car was only 35 feet away, and could not be stopped.

Appellant's contention is, that inasmuch as the plaintiff and the party driving the automobile saw the approaching street car and its rapid rate of speed, the failure to give warning by bell or gong was not a proximate cause of the injury, and the question should not have been submitted to the jury.

The instruction authorized a verdict for plaintiff if the jury believed that defendant's servants were negligent:

"In failing and omitting to ring the bell or gong with which said car was provided or to give any other audible notice or warning of the approach of said car while said car was propelled upon said track about three hundred feet to the point of such collision at a high and dangerous rate of speed."

In view of the fact that both plaintiff and the driver saw and knew of the approaching car when 600 feet away, the failure to give notice of the approach of the car by sounding the gong or otherwise was not a proximate cause of the injury, and should not have been made a predicate of a recovery. The purpose of sounding a gong or ringing a bell is to give notice of the approaching car. If the party has this notice, without the sounding of the gong or ringing of a bell, we have universally declared that the failure to sound gong or ring bell is not the proximate cause of that injury, and should not be made the predicate for a recovery. Under such circumstances the sounding of a gong or ringing of a bell could not impart more notice than the party already had. If one, at a crossing, sees a rapidly approaching train, no amount of whistling or bell ringing will give him more notice than that which his eyes have brought home to him. Indeed it would tend to confuse rather than help such a person. But be this as it may be, it is clear that the

submission of this ground of negligence to the jury in this case was error, for which the judgment must be reversed and the cause remanded. [Murray v. Transit Co., 176 Mo. 183; Hutchinson v. Railroad, 195 Mo. 546; Heintz v. Transit Co., 115 Mo. App. 1. c. 670; Mockowik v. Railroad, 196 Mo. 550; Young v. Railroad, 227 Mo. 307.]

Let the judgment be reversed and the cause remanded. All concur.

CARTHAGE SPECIAL ROAD DISTRICT OF JASPER COUNTY, Appellant, v. J. C. ROSS et al.

Division One, February 20, 1917.

1. **PUBLIC ROAD FUND: Devoted to Other Uses.** Section 10481, Revised Statutes 1909, in declaring that the tax of not more than twenty cents authorized by it to be credited to the road district from which said tax is collected shall constitute the road fund of the several road districts of the county, forbids the county court to devote the fund to other uses.
2. ———: **Discretion of County Court.** The county court has no discretion as to the levying of at least ten cents on the hundred dollars directed by the amendment of 1913 to section 10481, Revised Statutes 1909; its duty to levy and appropriate at least that much to special road districts is compulsory, and it can divert the tax to no other purpose. Its discretion under that section and amendment pertains only to the levy of an additional tax of ten cents on the hundred dollars' valuation.
3. ———: **Meaning of Statutes.** The theory of the statutes (Secs. 10481 and 10483, R. S. 1909) is: (1) that the bridges and roads are to be first taken care of, so far as that duty is developed upon the districts, by the constitutional levy for county purposes, to the extent at least of ten cents on the hundred dollars' valuation; (2) if that amount is not sufficient for such purpose the county court may raise it to twenty cents; and (3) in its discretion, it may levy the whole or any part of the twenty-five cent special levy authorized by the constitutional amendment of 1908, to be expended in such manner and through such agencies as are charged by law with the establishment, construction and maintenance of roads and bridges.

Road Dist. v. Ross.

4. ———: **Transfer to Other Funds: Modified by Road Laws.** Section 3786, Revised Statutes 1909, declaring that "whenever there is a balance in the county treasury to the credit of any special fund, which is no longer needed for the purposes for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance," is still live law as to all the revenue of the county remaining within the control of the county court; but the road fund has by later enactments been removed from the court's control and entrusted to other agents, to be expended by them for a definite purpose.
5. ———: **Diverted to Other Funds.** Revenue for other county purposes cannot be increased at the expense of the roads. The county court after having made a levy of fifty cents on the hundred dollars for county purposes, the maximum tax it is permitted by the Constitution to levy for those purposes, cannot divert ten cents on the hundred dollars of it to other county purposes, but so much of the fifty cents as is collected from property within a special road district as is levied for road purposes must be credited to the treasurer or commissioners of such district.
6. ———: **Discretionary Powers of County Court.** The Legislature has no power to compel the county court to levy the twenty-five-cent tax on the hundred dollars authorized by the constitutional amendment of 1908, but if the tax is levied the county court can apply it to road and bridge purposes, but to no others. But the county court is compelled to levy at least ten cents on the hundred dollars under Sec. 10481, R. S. 1909, for road purposes, and that much at least of the general revenue of the county it must apply to the road districts from which the tax arises, to be spent, not by it, but by the agencies which the statute designates.

Appeal from Jasper Circuit Court.—*Hon. David E. Blair*, Judge.

REVERSED AND REMANDED.

Gray & Gray for appellant.

McReynolds & Halliburton and *S. W. Bates* for respondents.

BROWN, C.—The following is the statement of facts made by appellant in its brief and adopted by the respondent:

"The city of Carthage and contiguous territory in Jasper County, Missouri, was, under the authority of sections 10576-10586, Revised Statutes 1909, as amended in 1911, organized as a body corporate to be thereafter designated as the 'Carthage Special Road District of Jasper County.'

"This suit was brought in the circuit court of Jasper County by the road district as plaintiff against Jasper County and the judges of the county court to restrain the defendants from transferring the funds which the court had set apart, under the provisions of section 11423, Revised Statutes 1909, for road and bridge purposes, and the sole question is whether the road district is entitled to any part of the funds levied and apportioned under said section.

"Acting under the provisions of said section, the county court of Jasper County on the 5th days of May, 1913, after having levied a tax of fifty cents on the one hundred dollars' assessed valuation for county purposes, made the following order:

"Ordered by the court that 'County Revenue Fund' be subdivided and apportioned, as follows:

"All in accordance with the law. Same covering taxes for the year 1913.

"\$29,500.00 or 20 per cent for Contingent Fund.

"\$36,875.00 or 25 per cent for Pauper Fund.

"\$36,875.00 or 25 per cent for Salary Fund.

"\$29,500.00 or 20 per cent for Road and Bridge Fund.

"\$14,750.00 or 10 per cent for Grand and Petit Jury, Judges and Clerks of Election Fund.

"The \$29,500 so apportioned to the Road and Bridge Fund was not received by the county until the collector made his settlement in January, 1914, and the county court used no part of said funds on the roads of the county for the year 1913, because the same were not on hand, but as soon as the same were received, concluded not to do any road work, and treated the whole funds levied for road purposes as a surplus, no longer required for road purposes, and proposed to turn them

over to the county treasurer to pay other current expenses of the county for 1913.

“The records show that the road commissioners of the plaintiff in the year 1913, contemplating this money would be collected and paid over to them for road purposes in the district, constructed roads and bridges and made demands in writing on the county court for the funds, but their requests were first refused because the funds were not on hand, and then when the funds were received, refused altogether, claiming that the funds were a surplus fund no longer needed for the purpose for which they were levied and collected, and the court proposed to transfer them to pay other current expenses of the county.

“The answer admitted making the order above set forth, and also that the county court proposed to apportion as a surplus the \$29,500 to the payment of current expenses, on account of there being a deficit in the Pauper Fund, the Jury Fund and the Incidental Fund in the county.

“The answer also admitted that a written demand had been made to the court by the plaintiff for the funds, and that the court had refused to pay any part of the same.

“In addition to the pleadings there was an agreed statement of facts filed by which it was admitted that no part of the funds had been paid to plaintiff or its commissioners; that no part of them had been paid out by the county court; that the county court had drawn no warrants thereon, and that the plaintiff, by its commissioners, had made a written demand on the court for its part of said funds, and at the time said demand was made, there were outstanding obligations of the plaintiff for road work performed by plaintiff in its said district and contracted since the making of the order of May, 1913, and prior to January 1, 1914.

“The court dismissed the plaintiff’s bill and it appealed to this court, and, as above stated, the only question is: What shall be done with the funds that were

levied and apportioned for road purposes under the order of the court on May 5, 1913?"

I. Our road laws remind us of the famous comment of Peter on the epistles of his Beloved Brother Paul: "In which are some things hard to be understood." We have been compelled to approach them frequently during the last few years, and do so with the feeling that we are taking up a bundle of plugs, whittled to suit well enough the local uses that suggested them, but far too small for the apertures into which we are called upon to fit them. In the attempt to do so it will be of service to consider the broad foundation upon which they rest. The entire highway system is a unit. The legislative problem is to provide money to construct, improve and maintain these facilities in such a way as to distribute the burden approximately in proportion to the benefit received by each locality, as well as by each taxpayer. It is evident that this problem is not well solved by a system of little units like our road districts, for it is frequently the case that the most expensive roads must lie over the roughest, most unproductive and least valuable lands.

II. This suit is a conflict between the county and the plaintiff road district as to which of them is entitled to a fund raised by taxation of the property in the plaintiff district. It is a part of the levy of fifty cents on the hundred dollars valuation for county purposes authorized and limited by section 11 of article 10 of the Constitution, and levied as a road tax in pursuance of section 10481 of the Revised Statutes of 1909, as amended in 1913. Section 10481 was, as originally enacted, as follows:

"The county court in the several counties of this State, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law, outside of incorporated cities, towns and villages, a tax of not more than twenty cents on the one hundred dollars' valuation as a road tax, which levy shall be collected and

paid by the collector into the county treasury as other revenue, and the county treasurer shall place the same to the credit of the road district from which said tax was collected and shall pay the same to the overseer of said district on the warrants of the county court. The money derived from such road tax shall be expended by the respective road overseers in purchasing necessary tools with which to work the roads in their districts, in purchasing material to build or repair bridges and culverts, and for such other expenditures as may be necessary to keep the roads in their districts in good order: *Provided*, that the construction of all bridges and culverts shall be under the direction or supervision of the county highway engineer."

Included in the same act was section 10482, passed in pursuance of the constitutional amendment of 1908 (included in article 10 as section 22) authorizing the levy of an *additional* tax of twenty-five cents for road and bridge purposes. The next section of the same act (Sec. 10483, R. S. 1909) is as follows:

"All moneys collected under the levy authorized by section 10481, and paid into the county treasury, shall constitute the road fund of the several road districts, and shall be disbursed only by authority of the county court as provided by law, and no part thereof shall be used to pay costs and damages in opening new roads."

We are thus enabled to say with certainty that these three sections, together with sections 11 and 22 of article 10 of the Constitution on which they rested, were before the Legislature at the same time, and were enacted as a single plan to raise money for all purposes connected with roads and bridges; and that whatever we may think of their propriety, we must defer to the legislative will and give effect to all their provisions.

We have nothing to do in this case with any other fund than that levied under section 10481.

Up to this point we are impressed with the care and precision with which the Legislature hedged about the fund appropriated for roads and bridges out of the tax

levied under the Constitution for "county purposes." It was not only declared in the section which authorized its levy that it be placed to the credit of the road district from which it was collected and paid to the overseer of such district on warrants of the county court and expended by the overseer, but also declared that it *should constitute the road fund of the several road districts*. In these provisions we can see no evidence of any intention that the county court might devote it at will to other uses.

III. At the legislative session of 1913 a doubt seems to have arisen as to whether the county court might not, in its discretion, refuse to appropriate any portion of the general revenue for county purposes as a road-and-bridge fund, and for that purpose depend entirely on the additional levy authorized by the constitutional amendment of 1908; and section 10481 was so amended as to require the inclusion of a road tax of at least ten cents on the one hundred dollars' valuation in the levy for county purposes, and provided that the amount thereof collected upon property within any special road district should be paid into the county treasury as other revenue, and that the county treasurer should place the same to the credit of the special road district from which it was collected and "pay the same to the commissioner or treasurer of such special road district on warrants of the county court." [Laws 1913, p. 668.] It is under this provision of section 10481 as so amended by the Act of 1913 that the plaintiff is now claiming. It will be seen that this tax is appropriated by the same statute which not only authorized, but imperatively required, its levy for the very purpose from which the county court is now seeking to divert it. The Act of 1913 took effect on March 25th and before the May term at which this levy and distribution was made. Instead of being, like the levy of twenty-five cents authorized under the constitutional amendment of 1908, *discretionary*, and for general road and bridge purposes, it was *compulsory*, and might, in the discretion reserved

to the county court by the constitutional amendment of 1908, constitute the only road-and-bridge fund. These provisions completely cover the following statement in the respondents' brief: "It is conceded in the case at bar that if the county had appropriated only a meagre amount to the road-and-bridge fund of the revenues collected for county expenditures, then this special road district would have no claim on it. It is not claimed but that the county court had ample authority to subdivide the fund for county revenue purposes under section 11423 as it thought best." The county court had no right to appropriate only a "meagre amount" of the general county revenue for the road-and-bridge fund. It was bound by the compulsion of the statute to levy and appropriate not less than ten cents, and would have violated that obligation had it appropriated less. It is, to put it mildly, *non sequitur* that it could have avoided it by levying the ten cents for the building of bridges and repairing of roads, and then transferring it to the pauper, jury and incidental funds. If the road fund is to be skimmed, it must be done through the reduction or omission of the *discretionary* tax authorized by the constitutional amendment of 1908. The theory of the statute (sections 10481, 10482, 10483) is so clearly expressed that it may be easily read from horseback: (1) that the bridges and roads are to be first taken care of, so far as that duty is devolved upon the districts, by the constitutional levy for county purposes to the extent of at least ten cents on the hundred dollars; (2) if that amount is not sufficient for such purpose the county court may raise it to twenty cents; and (3) in its discretion, it may levy the whole or any part of the twenty-five-cent special levy authorized by the constitutional amendment, to be expended in such manner and through such agencies as are charged by law with the establishment, construction and maintenance of roads and bridges. In our opinion the Legislature showed good judgment in assuming that at least one dollar on each thousand of assessed valuation of the rural property of the State can be profitably expended in the construction, improvement and maintenance of our country

roads and bridges, so far as their expense has been charged upon the districts.

IV. The respondent cites section 3786, Revised Statutes 1909, in support of its contention that the county court had the power to transfer this fund to other uses than those connected with roads and bridges. It provides that: Whenever there is a balance in any county treasury in this State to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance." The succeeding section limits this right of transfer to "balances of funds of which the objects of their creation are and have been fully satisfied."

Balance
to Credit
of Fund.

These sections have stood upon our statute books since their enactment in 1897, without change, except as modified by subsequent legislation charging the road districts, agencies of the State expressly created for such purposes, with control and expenditure of this fund. In so far as these laws are inconsistent with the provisions we have mentioned they must yield to the last expression of the legislative will, which, as we have already shown, is definite and unmistakable. These sections are still living laws in their application to all revenue of the county remaining within the control of the county court. This particular fund has plainly been removed from its control and entrusted to other hands to be expended by other agents, while leaving ample resources at its command for application to any road and bridge purpose which may still remain within the range of its duties. These old provisions cannot stand with these definite and inconsistent expressions of a later legislative policy and must therefore yield to them.

V. We are cited by the respondents to the cases of Holloway to use *v. Howell County*, 240 Mo. 601, and *Decker v. Diemer*, 229 Mo. 296, to sustain the right of

Road Dist. v. Ross.

the county to transfer this fund. The first of these cases was a suit for accounting to ascertain the balance in the county treasury of road funds collected by the county upon the property of the special road district for several years prior to 1909 and long before the bringing of the suit, for which no demand had been made. The case went off on that ground, and is consequently no authority in this case. The Decker case was a suit for road taxes levied by the county court in 1905, 1906, 1907 and 1908 and appropriated to the road-and-bridge fund. The suit was brought May 11, 1909, more than three months before the act of 1909, upon which, with its amendment of 1913, the right to recover in this suit is principally founded. Neither the constitutional amendment of 1908 nor the acts passed in pursuance of it were involved. This case is one of first intention and the controlling questions are now before us for the first time.

VI. In considering these questions our attention has been arrested by the general plan evident in recent legislation for raising and expending funds for road and bridge purposes in connection with sections 11 and 22 of article 10 of the State Constitution. The limit placed upon the levy for "county purposes," including this fund, has been acquiesced in as sufficient and salutary for all such purposes until the development of the State developed a growing necessity for additional expenditure upon its highways. This resulted in the amendment of 1908 embodied in section 22, authorizing an "additional" levy of twenty-five cents on the taxable property of the State to be used for these *and no other purposes whatever*. In other words, it was found desirable to increase the amount to be raised by taxation for this purpose without increasing the amount to be raised for other county purposes, which had been found to be entirely satisfactory. The amendment was adopted for this purpose alone, and legislation was immediately begun to carry it into effect in accordance with the spirit of economy which it exhibited. The

Cases
Distinguished.

General
Legislative
Plan.

amendment had, by affirmative words too plain to be mistaken, made the new power *discretionary* as vested in the county courts and township boards. So that the Legislature was without power to direct them to make the additional levy or any part of it. It could only *permit* it. Under these conditions sections 10481 and 10482, Revised Statutes 1909, were enacted. The first of these omitted the minimum requirement of five cents as it had existed (R. S. 1899, sec. 9436), but reserved the maximum limitation of twenty cents, and required that whatever the levy should be, the proceeds should be paid to the overseers of the several road districts which produced them. At its session of 1913 the Legislature repented that it forgot or otherwise omitted to insert a minimum requirement in this section, so that the taxation for other county purposes could not be increased at the expense of the roads, and further amended it by enacting that the levy for road taxes should be not *less* than ten cents, and inserted a proviso that the proceeds of the tax in special districts should be paid to the commissioners or treasurer.

The Act of 1909 also contained a provision for the levy of the additional tax provided by the constitutional amendment of 1908 in the very words of that amendment, and without any provision for the payment of any part of the money so produced to the road districts. This omission exhibits a plain intent to distinguish between the two funds as to the agencies to which they should be entrusted for expenditure.

It was a sensible scheme. Taking as a basis the fifty-cent levy authorized by section 11, article 10, of the Constitution, in Jasper County, it limited the general levy for county purposes other than roads and bridges to forty cents, provided a road fund of at least ten cents to be expended by the districts, and provided the means to be expended by the county in the building of bridges, location and opening of roads and other purposes charged upon the county at large. This seems to be the theory upon which the fund raised upon the general levy for county purposes from special districts was apportioned

Thompson v. Railroad.

by the proviso added to section 10481 by the amendment of 1913 as it had been to the other districts by the same section as originally enacted, while it was not applied to the next succeeding section, intending to put into effect the amendment of 1908. It amounted to a declaration by the Legislature that the words "road tax" as used in section 10801, Revised Statutes 1909, continued to have the same meaning and effect which they had standing in the same place in the same section when enacted in 1895. This is the opinion we expressed in *State ex rel. v. Everett*, 245 Mo. 706, and in which we are confirmed upon re-examination.

It follows that the judgment of the circuit court must be and is reversed and the cause remanded to the trial court for the entry of judgment for the plaintiff in accordance with the views we have herein expressed.

Railey, C., concurs.

PER CURIAM.—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All of the judges concur.

ANDREW J. THOMPSON v. ST. LOUIS & SAN FRANCISCO RAILROAD COMPANY, Appellant.

Division One, February 20, 1917.

1. **NEW TRIAL: Change in Judge.** If after a motion for a new trial, charging that the verdict is against the weight of the evidence, is filed, the judge who tried the case is succeeded by another, his successor has power to overrule the motion.
2. **NEGLIGENCE: Methods of Locking Switches: Conflicting Evidence.** Where the evidence as to the custom of railroads in locking switches is conflicting, there being no express rule on the subject, it will not be held as a matter of law that the method employed by defendant was that adopted and practiced by railroads generally, but the question is one of fact for the jury to determine.
3. ———: **Looking for Lever in Proper Notch: Contributory Negligence.** The switchman's testimony that as the car on which he was rid-

ing passed he looked at the switch points and they were in such position against the rails as to show the switch was set for the side track, and that they could not have been in the position in which they were—unless the lever was down in the notch in the switch-stand, is evidence that the switch was set for the side track and that the lever was in the proper notch as the car on which he was riding approached the switch; and it was for the jury to determine whether, in failing to see and know that the lever was set in the proper notch, he was guilty of negligence contributing to the derailment caused by the car entering upon the wrong track at the switch.

4. ———: **Riding on Main-Line Side of Train.** Under the circumstances of this case, whether it was contributory negligence for the switchman, riding on a car about to pick up another on a side track, to place himself upon the side of the car next to the main line, on which the train was standing, with which his car collided when the switch broke and it entered upon the main line, was a question for the jury.
5. ———: **No Switch Lock.** Likewise, under the circumstances, whether the railroad company, in view of the evidence tending to prove the likelihood of the lever jolting out of the notch at the switch-stand, was negligent in maintaining the switch without a lock, and in running its cars over it at a rate of ten or twelve miles per hour, was a question for the jury.
6. ———: **Instruction: Absolute Safety.** An instruction which required the jury to find that the switch-stand where the car left the track was negligently maintained without a lock and that such switch-stand without a lock was not a reasonably safe place—if another instruction defined negligence as “a want of ordinary care” and then properly defined those words—did not require a verdict for the injured switchman unless the switch was absolutely safe.
7. ———: ———: **No Requirement of Conformity to Custom: Non-Direction.** Sufficient proof of usage in the matter of locking a switch and of conformity to custom, may be said to rebut the idea of negligence in a proper case; and an instruction which excludes the idea that the jury should consider the evidence tending to show the railroad company’s practice in leaving the switch unlocked conformed to the usage of well managed lines, would be erroneous; but an instruction which contains no particular direction, but does require a finding of negligence, does not exclude the consideration of such evidence, but amounts only to non-direction, which may be supplied or covered by instructions for defendant.
8. ———: ———: **Assumption of Risks.** If the rules of the railroad company pertain solely to main-line switches and do not require the switch of a cross-over track to be locked, the switchman does not assume the risk of injury resulting from a failure to lock the cross-over switch.

Thompson v. Railroad.

Appeal from Mississippi Circuit Court.—*Hon. C. B. Faris*, Judge.

AFFIRMED.

W. F. Evans and *W. J. Orr* for appellant; *Boone & Lee*, of counsel.

(1) There was no proof of any breach of duty on the part of the company, because the plaintiff's evidence shows that the methods complained of were those adopted and practiced by railroads generally. *Chismer v. Tel. Co.*, 194 Mo. 189; *Brand v. Car Co.*, 213 Mo. 698; *Beckman v. Brewing Co.*, 98 Mo. App. 555; *Railroad v. Walker*, 172 Fed. 351; *Tuttle v. Railroad*, 122 U. S. 189. (2) The master is not required to take precautions against the consequences of the possible negligence of his own employees, nor is he required to anticipate such negligence, but may conduct his business upon the assumption that his servants will exercise the proper degree of care, and when he furnishes appliances and places which are reasonably safe as intended to be used when due care is exercised by those using them he has done his duty. *Grattis v. Railroad*, 153 Mo. 380; *Bridge Co. v. Seeds*, 144 Fed. 609; *Railroad v. Walker*, 172 Fed. 351; *Pollock on Torts*, 36. (3) Instruction "A" is erroneous in that it permits the jury to determine the law instead of the facts. It permits the jury to say what constitutes actionable negligence. And it nowhere furnishes a legal test as to actionable negligence on the facts in the case. (4) It is also erroneous in that it permits the jury to substitute conditions for negligence. It permits the jury to say whether the switch without a lock was not reasonably safe "under the circumstances," but does not tell them what circumstances may be legally considered, and absolutely ignores the "ordinary usage of the business" as the test. Authorities under point 1; *Bennett v. Lumber Co.*, 116 Mo. App. 699; *Dunn v. Nicholson*, 117 Mo. 374. (5) The defendant has never had the benefit of the right accorded all litigants to have the weight of the evidence passed upon by the trial court, because he re-

Thompson v. Railroad.

signed before the motion for a new trial was passed upon. *Mill Co. v. Sugg*, 142 Mo. 368; *McCarty v. Transit Co.*, 192 Mo. 396. (6) The weight and preponderance of the evidence being clearly against the verdict, defendant is deprived of the right guaranteed to all litigants to have this question determined by the only person permitted to do so, by reason of a circumstance over which it had no control, because no other court under the law is vested with the discretion to grant a new trial except the judge who tried the case. And defendant has never had the benefit of that discretion in this case. (7) Plaintiff's instruction "A" attempts to cover the entire case and cannot be aided by correct instructions given for the defendant in conflict with it. *Clark v. Hammerle*, 27 Mo. 55; *Budd v. Hoffheimer*, 52 Mo. 297; *State v. Lentz*, 184 Mo. 223; *Barth v. Loy*, 82 Mo. App. 601; *Glasscock v. Swofford Bros. Co.*, 105 Mo. App. 365.

David W. Hill and *Ernest A. Green* for respondent;
Russell & Joslyn, of counsel.

(1) The trial court did not err in overruling the defendant's demurrer to the evidence. There was such a showing of negligence on the part of the defendant as required the submission of the case to a jury. *Withers v. Railroad*, 151 Mo. App. 488; *St. Clair v. Railroad*, 122 Mo. App. 519; *Kremer v. Eagle Mfg. Co.*, 120 Mo. App. 247; *Lee v. Railroad*, 112 Mo. App. 372; *Dutro v. St. Ry. Co.*, 111 Mo. App. 258; *Charlton v. Railroad*, 200 Mo. 413; *Koerner v. St. Louis Car Co.*, 209 Mo. 157; *Berry v. Railroad*, 214 Mo. 593. (2) Instruction "A" given to the jury at the request of the plaintiff was a correct statement of the law, and required the jury to find every essential element in the plaintiff's case before it authorized a verdict for the plaintiff. *Crane v. Railroad*, 87 Mo. 595; *Campbell v. Stave & Lbr. Co.*, 146 Mo. App. 689; *Johnson v. Railroad*, 96 Mo. 340; *Deschner v. Railroad*, 200 Mo. 310. (3) Instruction "A" is not in conflict with any correct instruction given to the jury at the request of the defendant. *Bliesner v. Distilling Co.*, 174 Mo. App. 139; *Craig v. United Rys. Co.*, 175 Mo. App.

Thompson v. Railroad.

616; Farmer v. Railway Co., 178 Mo. App. 579; Johnson v. Traction Co., 176 Mo. App. 174; Spaulding v. Lumber & Mining Co., 183 Mo. App. 656; Budd v. Hoffheimer, 52 Mo. 303; Wood v. Kelly, 82 Mo. App. 601; Pendegrass v. St. Louis & S. F. Ry. Co., 179 Mo. App. 517; Sager v. Mining Co., 178 Mo. App. 503. (4) Judge Finch, the successor in office to Judge Faris, who tried the case, was expressly authorized by law to pass upon the motion for a new trial. There was no error in his so doing, even if this assignment of error could be reviewed. Sec. 2032, R. S. 1909; State ex rel. v. Perkins, 139 Mo. 117; Felhauer v. City, 178 Mo. 635; Bailey v. Coe, 106 Mo. App. 653; Glavis v. Wood, 78 Mo. App. 35; Richardson v. Mercantile Assn., 156 Mo. 407. (5) Defendant's motion for a new trial does not assign as a ground thereof that the verdict was against the weight of the evidence. Consequently, that matter could not have been reviewed by the trial court. But in any event, the verdict is fully supported by the great weight of the evidence. Kansas City v. Forsee, 168 Mo. App. 213; Bohn v. Lucks, 165 Mo. App. 701; Compressed Air Co. v. Fulton, 166 Mo. App. 11; Loftus v. St. Ry. Co., 220 Mo. 479; Honea v. Railroad, 245 Mo. 621.

BLAIR, J.—Respondent was a brakeman employed by appellant and was injured in a derailment. He recovered judgment in the Mississippi Circuit Court, and this appeal followed.

Appellant's tracks at Delta run east and west. On the north side of the main line is a side track about one-third of a mile in length and a little nearer the main line track than in the usual construction. At each end it connects with the main line by switches provided with locks. Nearly two hundred feet from the west end of this sidetrack is what is called a cross-over or intermediate track. It leads from the main line to the side track. Its west end connects with the side track and its east end with the main line. At the time respondent was injured an east-bound train on which he was acting as brakeman had stopped at Delta. One car near the rear

of the train was "spotted" at the station, which was just west of the west end of the side track. The train, nearly as long as the side track, extended east along the main line to a point several hundred feet beyond the east or main line switch of the cross-over. An order was received to "pick up" a car standing upon the side track, and respondent uncoupled the engine and proceeded with it to the switch at the east end of the side track. This switch he unlocked and opened, and the engine moved westward upon the side track. On this track there were three bunk cars, left for employees, and farther west was the car sought. There is evidence this car was standing west of the side track connection with the cross-over, and other evidence that it stood about opposite the side track cross-over switch. The engine backed westward along the side track and was coupled to the first of the bunk cars and then propelled the three westward until the car sought was reached, respondent riding upon the south side of the bunk car farthest from the engine and upon the side next to the main line. The side track cross-over switch-stand was on the north side of the side track. The rear bunk car was coupled to the car ordered to be "picked up" and the coupling made by impact. Respondent testified the first attempt failed, and that the car was driven west "into the main line train." There was evidence tending to show this car was, when the coupling was finally made, considerably over a hundred feet west of the cross-over switch-stand on the side track. There was evidence to the contrary. The engine, drawing the four cars, then started eastward for the main line, and respondent began to climb the ladder upon the south side of the rear car, that being on the side next the main line and nearest the cars in the train standing on the main line track. When the car on which respondent was riding reached the cross-over switch, instead of continuing along the side track, along which the engine was proceeding, it started down the cross-over, and struck a car in the train on the main line, catching respondent between the tops of the colliding cars and severely injuring him. There

was evidence tending to show that the engine backed some of the cars past the switch connecting the cross-over track with the side track, and that that switch was uninjured, but that it could not have been so had cars been backed over it while it was set for the cross-over track; also to show that some of the cars had, after the engine started east, passed over the switch points and continued eastwardly upon the side track; that, at the time the car on which respondent was riding reached the cross-over switch it was moving ten or twelve miles per hour; there was evidence that unless the lever used to turn the cross-over switch was in the notch provided to hold it, the jolting of cars passing over the switch might throw the switch, and evidence that the lever on this particular switch would be jolted out of such notch by cars passing over the switch; that this was its condition after the injury to respondent, and that the switch was then in the condition it was in at the time of the accident and in which it had been long prior thereto. It was shown the switch-stand had a place for a lock and that a lock could have been supplied for forty cents, and would, if in use and in place, have prevented the injury; but that such lock was not in use and had never been used on that switch. There was in evidence a company rule requiring main line switches to be locked, but no rule was offered which had any reference to cross-over switches at the end connecting with a side track. There was evidence both ways on the question whether well managed railroads customarily maintained locks on such switches.

The switch-stand targets were rusty and their colors nearly obliterated, but differences in shape were designed to indicate whether the switch was set for the cross-over or the side track. Respondent testified he rode upon the side of the car next the main line, because the engineer was upon the right hand side of the engine and signals could be given him directly only on that side; that this was in conformity to the rule or, at least, regular custom, in backing, when the track was so the engine could be seen from the right hand side of the car; he said he did not look at the switch, as the engine backed down, but

did look, as was his duty, at the switch points and they were lined for the side track; and that they could not have been as he saw they were unless the switch lever was in the notch.

Respondent's position is that the switch was thrown by the jolting of the cars ahead of the one he was riding on and that it resulted from the negligent speed of the train and the absence of a lock on the switch. Appellant contends there was no negligence; that respondent assumed the risk, and that his injury resulted from his contributory negligence. Other facts may be stated in the course of the opinion.

I. This case was tried before Judge C. B. Faris, now of this court. While the motion for new trial was pending, he was succeeded by Judge Finch. Judge Finch overruled the motion. Appellant now urges he had no power to do so. The substance of the argument advanced is that the motion assailed the verdict as against the weight of the evidence; that this question called for an exercise of discretion by the judge, and that the trial judge, alone, was in position to exercise such discretion in ruling upon it. Both divisions of this court have held the contrary. [State ex rel. v. Perkins, 139 Mo. l. c. 117, 118; Fehlhauer v. St. Louis, 178 Mo. l. c. 653; Richardson v. Agr. & Mec. Assn., 156 Mo. l. c. 412, 413; also Glaves v. Wood, 78 Mo. App. 351.] Appellant relies on St. Francis Mill Co. v. Sugg, 142 Mo. 364. That case applied the rule in force prior to the amendment of the statute discussed in State ex rel. v. Perkins, supra. The motion considered was one filed prior to the amendment. The third paragraph of the syllabus indicates the ruling actually made. Defendant's right, in that case, under the rule in force, accrued prior to the amendment. It was not a mere matter of procedure. It was then a right to a new trial. That case is no authority in this.

New Trial.

II. Appellant contends the case should not have gone to the jury.

Thompson v. Railroad.

(a) The first ground advanced is "that the methods complained of were those adopted and practiced by railroads generally." The record does not show this to be true as a matter of law. When such usage is relied on it must be proved. The evidence in this case on this issue was conflicting, and it was for the jury to determine the fact. [Yost v. Railroad, 245 Mo. l. c. 244, 245.] In *Trebbe v. American Steel Foundries*, 185 S. W. l. c. 182, this court, considering this question in connection with *Chrismer v. Bell Tel. Co.*, 194 Mo. l. c. 208, 209 (a case upon which appellant relies), said: "Neither that case nor any cited in it, however, is authority for any rule that a court can assume the existence of a common usage, in the face of a conflict of evidence on the question running through all the evidence offered in that connection." A question of fact as to whether an asserted common usage actually existed is to be submitted to the jury like any other.

Common Usage.

(b) Another ground upon which it is urged the case should have been taken from the jury is this: there was evidence tending to show the accident might have happened as it did if the switch lever on the side track

Lever in Notch. cross-over switch-stand had not been placed in the notch prepared in the stand to hold it and

was not in the notch when the cars were moving over the switch; that this condition would have rendered the switch so insecure that when the engine started west the switch might have been jolted around or the switch points pressed over by the flanges on the wheels, so that the switch would have been thus set for the cross-over and the accident would have resulted; that it was respondent's duty to see that the switch lever was set in the proper notch and that he did not do so; therefore, that there was a showing of a probable cause for the injury for which respondent's contributory negligence was responsible and, it is argued, we must apply the rule that when there is evidence tending to prove two causes of injury, for one of which defendant is liable and for one of which it is not, plaintiff must fail in the absence of a

showing that his injury came from the former; and that this rule requires judgment for appellant in this case.

Respondent does admit he did not look at the lever, but he testifies, in substance, he looked at the switch points and they were in such position against the rails as to show the switch was set for the side track, and that they could not have been in the position they were in unless the lever was down in the notch. On cross-examination he gave his reasons. This was evidence the switch was set for the side track respondent was using, and that the lever was in the proper notch as the car on which respondent was riding approached the switch. There was evidence the switch was not set for the cross-over, as well as evidence to the contrary. There was evidence some of the cars were backed over the switch in order to reach the car to be picked up; that these cars would have broken the switch had they been backed over it while it was set for the cross-over; and that the switch was not broken. It was for the jury to say whether they would believe respondent's testimony as to the lever being in the notch when the switch points were in the position he testified they were and it was for them to determine, under proper instructions, whether the cause of injury was proved for which appellant was responsible, i. e. whether the preponderance of the evidence pointed to such cause.

(c) Whether, in the circumstances, it was contributory negligence for respondent to place himself upon the side of the car next the main line on which the train was standing was a question for the jury, at most.

(d) In the circumstances it was a question for the jury whether appellant was negligent, in view of the evidence tending to prove the likelihood of the lever jolting out of the notch, in maintaining the switch without a lock and running its cars over it at ten or twelve miles per hour.

(e) It is quite clear the evidence did not establish as a matter of law that respondent assumed the risk of using the switch.

III. It is most earnestly contended instruction "A," given for respondent, was erroneous. That instruction reads thus:

"The court instructs the jury that if you believe and find from the evidence in this cause that on, and for some time prior to, the 6th day of May, 1909, the defendant carelessly and negligently furnished
Instruction. and maintained a switch-stand without a lock therefor, at a point on its passing track, at the town of Delta, where its cross-over track connected said passing side track with defendant's main line at that point, and that such switch-stand, without a lock, was not a reasonably safe appliance at said place and under the facts and circumstances, and that on the 6th day of May, 1909, the defendant, by its engineer, carelessly and negligently ran a train of cars along and upon said passing track at a rate of speed that was not reasonably safe to defendant's other employees working on and around said train, under the existing conditions; and that as a result of such speed of the train and as a result of the carelessness and negligence of the defendant in failing to provide and maintain a lock for such switch-stand at the west end of said cross-over track, and if you find that such act was under the circumstances negligent, one of defendant's cars, then being drawn by defendant's locomotive engine, then being operated by defendant, its servants and employees, was thereby and thus caused to suddenly leave said passing track and to go upon said cross-over track and to suddenly and violently collide with defendant's train of cars upon the main line, thereby and thus catching and crushing plaintiff between the car upon which he was riding and a car upon the main line aforesaid, while he was in the line of his duty as a brakeman for the defendant, thereby and thus wounding his left hip, back, bladder, testicle and urethra, and depriving him of any portion of his earnings; and that the danger incident to the operation of an engine and train of cars upon said passing track by said switch-stand without a lock was not so apparent or obvious as to cause a reason-

ably prudent person to not operate them; and that the plaintiff, when injured was exercising such care as a person of ordinary prudence would have exercised under the same or similar circumstances, then and in that event your verdict in this cause must be for the plaintiff, Andrew J. Thompson."

(a) It is insisted that the instruction required a verdict for respondent unless appellant's switch was absolutely safe, whereas, it is said, the rule is that it is the master's duty to use ordinary care to provide reasonably safe places and appliances. The instruction, in this connection, required the jury to find (1) that the switch-stand was negligently maintained without a lock, and (2) that such switch-stand, without a lock, was not a reasonably safe appliance. Instruction "D," given for respondent, defined negligence as "a want of ordinary care," and then defined ordinary care. No objection is made to these definitions. Substituting for the word "negligently," where it first appears in Instruction "A," the definition in Instruction "D," it appears the meaning of this part of the instruction is the legal equivalent of the formula appellant urges should have been used.

(b) It is said the legal test of negligence in the use of a given switch is the usage in the railroad business and that the instruction excludes this and leaves it to conjecture. "It is true . . . conformity to custom" in the business "is not evidence of negligence, but departure from it is" (*Yost v. Railroad*, supra, l. c. 245), and let it be conceded that had Instruction "A" excluded the idea that the jury should consider the evidence tending to show appellant's practice in leaving this switch unlocked, in all the circumstances, conformed to the usage on well managed lines, it would have been erroneous. Sufficient proof of such usage may be said to rebut the idea of negligence in a proper case. Instruction "A" did not exclude the consideration of that evidence. With respect to it the instruction contains no particular direction. It does, generally, require a finding of negligence. This non-direction was fully covered by appellant's instructions which were strong and clear.

Thompson v. Railroad.

Had they failed to cover the matter fully, appellant could not complain. Upon a like question, this court in *Trebbe v. American Steel Foundries Co.*, 185 S. W. 1. c. 183, said:

“The instruction concerning the omission of the safety block or safety appliance of some kind required the jury, before finding for respondent, to find the facts of the occurrence in accordance with the tendency of the evidence supporting respondent’s view, and then to find that there was a failure to place a safety device upon the appliance, and then to find that such omission constituted negligence, want of ordinary care. Other instructions defined ordinary care in a manner not objected to, and, at appellant’s instance, also directed the jury that if it was not customary to equip air hoist beams with safety blocks, and if appellant had no reason, in the exercise of ordinary care, to anticipate that the lack of a safety block was dangerous, and if ‘the accident in question here brought to defendant’s attention for the first time the desirability of such a safety device,’ then there was no negligence in failing to supply the safety block. This meets substantially the objection that respondent’s instruction permitted a finding for him though safety blocks were previously unknown.”

The same principle answers the contention in this case.

(c) The insistence that the instruction requires the master to anticipate and provide against the negligence of the servant is not tenable. It assumes respondent’s contributory negligence.

**Anticipating
Injury.**

That was an issue for the jury, and the instruction even required a finding of respondent’s freedom from contributory negligence before a verdict for him could be rendered.

(d) The criticism of Instruction “A” based upon the idea that the rules of the company “did not require the switch to be locked” and that Thompson agreed to

State ex rel. v. Brewing Co.

familiarize himself with the rules and, therefore, so continuing in service must be held to have assumed the risk, is untenable. No rule was offered relating to cross-over switches so far as concerned those at the side track end. Rule 104 pertained solely to main line switches. Instruction "A" left open, sufficiently, the question of assumption of risk, and appellant's instruction given secured for it the full benefit of the principle for which it contends, covering specifically the idea now advanced in criticism of the instruction.

(e) With respect to respondent's contributory negligence, if any, appellant secured an instruction which gave it, at least, the benefit of every principle which it was entitled to have placed before the jury.

(f) There is no conflict of instructions of which appellant can complain. Instruction "A" is the only instruction assailed. The grounds upon which it is argued conflict appears are, generally, the same put forward in support of the contention that the demurrer to the evidence should have been sustained. Also they depend, to some extent, upon a construction of the evidence we do not think the record sustains.

The judgment is affirmed. All concur, *Bond, P. J.*, in result.

THE STATE ex rel. GLEN G. WEATHERBY, Prosecuting Attorney, v. DICK & BROS. QUINCY BREWING COMPANY, Appellant.

Division One, February 20, 1917.

1. **INJUNCTION: Public Nuisance: Selling Liquors.** Injunction cannot be used to restrain the sale of beer in a county which has adopted the Local Option Law unless the seller has been guilty of aiding and abetting the commission of a public nuisance.

State ex rel. v. Brewing Co.

2. ———: ———: ———: **Pleading.** The petition for an injunction to restrain the selling of intoxicating liquors must specifically set out the facts constituting the public nuisance. The mere statement of legal conclusions is not sufficient.
3. ———: ———: ———: **Statement of Cause of Action.** A petition for an injunction charging that defendant from its brewery in Illinois daily sells and ships into a Missouri county in which the Local Option Law is in force, to divers persons, large quantities of beer; that it has been so selling and shipping for a long time, and will continue to do so unless restrained therefrom, does not state the semblance of a cause of action, because (1) the statute (Sec. 7228, R. S. 1909) authorizes any person in such county to order liquor for his own and his family's use where it is sent directly to him, (2) the brewer is authorized to sell beer in Illinois to such a person, and (3) in the absence of any charge to the contrary it cannot be presumed that the brewer was violating any law in shipping beer to persons in said county.
4. ———: ———: ———: **Public Nuisance: Aiding Sales.** And a petition which further charges that by reason of such shipments divers persons are enabled to sell, barter and give away said beer in said county, contrary to the Local Option Law; that by reason thereof said Illinois brewer is assisting and enabling such persons to sell beer in said county by retail and thereby maintaining a public nuisance, fails to state any facts which even remotely tend to show that the defendant brewer violated any law in selling said beer in Illinois, or assisted by such sale in establishing a nuisance in said county.
5. ———: ———: ———: **Turbulent Crowds: Scienter.** And averments in said petition that by reason of the sale of beer in said local-option county large crowds of idle and turbulent people assemble at the places where such beers are kept and sold, to the great injury of society and the general welfare of the people of the county, without naming the vendors or the places where the beers are sold, and without charging that the defendant or any of his agents knew or knows of the congregation of said idle and turbulent persons, does not charge facts sufficient to show that the defendant brewer in Illinois is maintaining a public nuisance in said county.
6. ———: ———: **Crime.** The congregation of divers idle and turbulent persons in secret places where intoxicating liquors are sold and drunk may constitute a crime; but a brewer, who is not charged with knowledge of their turbulent character or of their assembling and drinking in such secret places, is not maintaining a public nuisance by the mere fact that the beer sold at his Illinois brewery enables divers persons to sell it in such Missouri town.

Appeal from Adair Circuit Court.—*Hon. Charles D. Stewart, Judge.*

REVERSED AND REMANDED (*with directions*).

Chas. E. Murrell for appellant.

(1) The State could not have resorted to a court of equity to restrain consignees from selling intoxicating liquors, including beer, and conducting their places and carrying on their business as stipulation states they did. They were violating the criminal laws of the State and should have been prosecuted under such laws. State ex rel. v. Urig, 14 Mo. App. 413. (2) Even though consignees could have been restrained from selling intoxicating liquors and maintaining nuisances, it does not follow that appellant could be restrained from filling orders for beer and consigning the same to them. State ex rel. v. Moffett, 188 S. W. 930; 29 Cyc. 1202; State v. Rankin, 3 S. C. 438. (3) Appellant was engaged in interstate commerce and neither the county nor the circuit court could regulate or restrain that commerce. U. S. Constitution, art 1, sec. 8. (4) Respondent's bill shows on its face that the State has an adequate remedy at law by resorting to criminal prosecution against consignees. (5) The court had no jurisdiction of the subject-matter of the suit, and is without authority to regulate appellant's acts and conduct in a foreign State.

Glen C. Weatherby pro se.

(1) If the evidence in the case shows that the defendant is selling and causing to be delivered intoxicating liquor to a person or persons, in a local-option county, knowing that the person or persons to whom such liquor is sold and delivered, are selling said liquor in contravention of law, and that the sale thereof by such person or persons, is habitual, and results in drawing together at the place where said liquor is sold, numbers of idle, dissolute and vicious people, addicted to the use of intoxicants, then and in that event, plaintiff contends, that the defendant is aiding and abetting the maintenance of a public nuisance and is subject to the police regulation of the State to be administered through and by a

State ex rel. v. Brewing Co.

court of equity and subject to be enjoined on a proper procedure therefor. State ex rel. Thrash v. Lamb, 237 Mo. 437; State v. Intoxicating Liquors, 106 Me. 138; 29 Cyc. 1201. (2) It is argued by the defendant, that the shipments of liquor, involved in this case, were interstate, and hence, protected by the Interstate Commerce Act, and that a State cannot by injunctive process, restrain interstate shipments of liquor. Against this contention plaintiff presents the Webb-Kenyon Law, which has been held constitutional in the following cases: United States v. Oregon Nav. Co., 210 Fed. 378; State v. Grier, 88 Atl. 579; State v. Van Winkle, 88 Atl. 807; State v. Express Co., 145 N. W. 451.

RAILEY, C.—Respondent, as prosecuting attorney of Adair County, Missouri, filed in the circuit clerk's office a petition to restrain defendant from shipping beer into said county, in violation of the Local Option Law, in force in said county. The petition alleges, that the Local Option Law of this State is and has been in force in said county; that defendant daily sells and ships into Adair County aforesaid, to divers persons, large quantities of intoxicating liquors, to-wit, beer; that defendant has been so selling and shipping for a long time, and will continue so to do, unless restrained therefrom. The petition alleges:

“That by reason of the defendant selling and shipping beer, as hereinbefore alleged, into said Adair County, Missouri, divers persons are enabled to sell, barter and give away said intoxicating liquors, to-wit, beer, in said county, contrary to the Local Option Law, and by reason thereof said defendant is assisting and enabling such persons to sell by retail in said Adair County, Missouri, such intoxicating liquors, and thereby maintaining public nuisances throughout said county.

“That by reason of the sale of such intoxicating liquors in said county large crowds of idle and turbulent people addicted to the use of intoxicating liquors assemble at the places where such intoxicating liquors are kept and sold, to the great injury to society and the

general welfare of the people of said county; that unless said defendant is restrained from selling and shipping said liquors into said Adair County, Missouri, such nuisances will continue to be maintained in said county, and the interest of the people and the general welfare of the public thereby and by reason thereof, jeopardized."

The petition states that there is no adequate remedy at law.

The prayer covers the allegations of petition, and the latter is duly verified, etc.

The answer of defendant admits that it is a corporation, organized under the laws of Illinois, with its place of business at Quincy, in said State; that it is now, and has been for many months prior hereto, engaged in the manufacture and sale of intoxicating liquors, to-wit, beer; that it has been engaged in the business of manufacturing and selling beer at said city of Quincy in the State of Illinois. The answer denies each and every other allegation contained in plaintiff's petition.

The answer further charges that the acts and matters complained of in petition, are matters of interstate commerce; that if a restraining order is issued herein it will be in violation of section 8, article 1, of the Constitution of the United States, in that it attempts to restrain and regulate commerce between the citizens of the State of Illinois, and citizens of the State of Missouri; that such restraining orders are and would be in violation of the Fourteenth Amendment of the Constitution of the United States of America, in this, that it abridges the privileges and immunities of citizens of the United States and deprives the defendant of its property and rights without due process of law, and denies to the defendant the equal protection of law; that said restraining orders prevent defendant from exercising its rights and privileges granted it by virtue of section 7228, Revised Statutes 1909 of Missouri, in this, that it prohibits and prevents the defendant from selling and delivering to any person or persons in Adair County, Missouri, intoxicating liquors for their own, or family

State ex rel. v. Brewing Co.

use, where such liquors are sent direct to the person using same; that said restraining orders deprive defendant of its property without due process of law in violation of section 30, article 2, of the Constitution of Missouri, and section 4, article 2, of the Constitution of Missouri; that the plaintiff has an adequate remedy at law.

The case was submitted to the trial court upon the following stipulation:

“(1) That the defendant is a corporation organized under the laws of the State of Illinois, with its place of business at Quincy, in the State of Illinois, and that said defendant has been, at all times mentioned in the plaintiff's petition, engaged in the manufacture and sale of what is known as ‘Dick Brothers’ Beer,’ an intoxicating liquor, at Quincy, Illinois.

“(2) That at the times mentioned in the petition the Local Option Law was in full force and effect within the corporate limits of the city of Kirksville, and within the limits of Adair County outside of the city of Kirksville.

“(3) That at all the times mentioned in the petition in this cause, the persons specifically named in said petition, as well as divers other persons in said Adair County, and in said city of Kirksville, were, and had been for several months prior to the filing of said petition, engaged in the habitual sale of intoxicating liquors, including beer, both within the corporate limits of said city of Kirksville, Missouri, and in Adair County, Missouri, outside of the corporate limits of said city of Kirksville; and that said parties sold said intoxicating liquors, including beer, to any and all persons who might apply therefor, indiscriminately, and on every day of the week, including Sunday; and that by reason of such sales of intoxicating liquors, large crowds of idle and turbulent people addicted to the use of intoxicants assembled at said places of business for the purpose of buying and drinking intoxicating liquors.

“(4) That the defendant did frequently, at short intervals, up to the time of filing the petition in this

cause, sell and cause to be delivered as herein below stated to the parties engaged in the habitual sale of intoxicating liquors, as aforescribed, quantities of beer ranging from one case upwards; that these shipments of beer were on the written order of the party buying the same taken by one Jess Jamison on a form as hereto attached and marked 'Exhibit A;' that sometimes the money was sent in with the order with which to pay for said beer, and sometimes collection was made therefor after delivery, either by remittance by mail from the purchaser direct to defendant or by payment to the said Jamison in Adair County.

"(5) That the said Jess Jamison was at all times mentioned in the petition the agent of the defendant for the purpose of receiving and sending to defendant written orders of the purchasers for such beer as shown by said Exhibit A; said orders being accepted or rejected by defendant at its option, at Quincy, Illinois.

"(6) That the orders for beer shipment, herein referred to, were ordered in writing in the name of the party buying the same, and delivered to railroad or express company at Quincy, Illinois, consigned to the party named in the written order.

"(7) That the said Jess Jamison is a resident of the city of Kirksville, Missouri, and has been for many years last past, continuously, and is personally acquainted with the parties named in said petition, and knew that such parties bore the general reputation of being constant violators of the Local Option Law."

"EXHIBIT A

"Mail Order Department

Date191....

"Dick & Bros. Quincy Brewing Co., Quincy, Ill.

Gentlemen: Please ship direct to the undersigned at, the goods mentioned below by express.

freight. Ship in the name of
Casks 10 Doz., Small size
Cases 3 Doz., Small size.....
Cases 3 Doz., Small size.....

State ex rel. v. Brewing Co.

.....Casks 6 Doz., Large size
Cases 2 Doz., Large size
Boxes 2 Doz., Large size
 Enclosed please find () for \$..... in
 payment of the above goods.

Respectfully,

Name
 Address
 ”

This was all the evidence.

The court found the issues for plaintiff, and concluded its judgment as follows:

“Wherefore it is ordered, adjudged, and decreed by the court that the defendant be and is hereby restrained and enjoined from selling and delivering to any person or persons, firm or corporation in Adair County, Missouri, intoxicating liquors, to-wit, beer, and that defendant be perpetually restrained and enjoined from causing said beer to be shipped to or delivered to any such person or persons, firm or corporation in Adair County, Missouri, except that defendant may sell and ship beer to any person or persons in said county where the same is in good faith ordered and bought by such person or persons for his own or family use, in which said case defendant shall ship and deliver said beer direct to the person ordering same.”

Defendant filed its motions for new trial and in arrest of judgment, both of which were overruled and the cause duly appealed to this court by defendant.

I. The prosecuting attorney of Adair County, Missouri, commenced this action by injunction, in the circuit court aforesaid, to restrain defendant from shipping beer into said county, where local option is in force, under the circumstances disclosed in the petition and agreed statement of facts, heretofore set out. The different sections of our statute relating to this subject, will be found in the Revision of 1909, as follows:

Section 7227: “No person shall keep, store or deliver for or to another person, in any county that has adopted or may hereafter adopt the Local Option Law, any intoxicating liquors of any kind whatsoever.”

Section 7228: "Nothing in the two next preceding sections shall be construed to prohibit any person from ordering liquor for his own or family use, where' such liquor is sent direct to the person using same."

Section 7243 provides that in local option counties, it shall not be lawful, for any person within the limits of such county, "to directly or indirectly sell, give away or barter in any manner whatever, any kind of intoxicating liquors or beverage containing alcohol, in any quantity whatever, under the penalties hereinafter prescribed." Any person found violating the provisions of sections 7227 and 7228 shall be deemed guilty of a misdemeanor and fined not less than \$300, nor more than \$1,000 or imprisoned in the county jail for not less than three months nor more than one year, or by both such fine and imprisonment (Section 7229). Any person violating section 7243, supra, shall be deemed guilty of a misdemeanor and punished by a fine of not less than \$300, nor more than \$1,000, or by imprisonment in the county jail not less than six months nor more than twelve months, or by both such fine and imprisonment.

There is no provision in our statute relating to injunctions, nor in the Local Option Law of this State, specifically authorizing the issuance of an injunction under the circumstances of this case. If any **Pleading.** right of action exists, it must be predicated upon the idea that defendant has been guilty of aiding and abetting the commission of a *public nuisance*; and that a court of equity has the inherent right to abate the same. The petition for injunction, in order to pass muster, must specifically set out the facts necessary to establish a *public nuisance*; and the mere statement of *legal conclusions* does not meet this requirement. [State ex rel. v. Railroad, 240 Mo. l. c. 50; Gibson v. Railroad, 225 Mo. l. c. 482.]

Considered in the light of above authorities, does the petition state facts sufficient to constitute a cause of action against appellant? The latter is chartered under the laws of Illinois, and so far as the record shows was

legally authorized to manufacture and sell beer in said State.

In *State v. Rosenberger*, 212 Mo. 648 et seq., Morton, a resident of Webster County, Missouri, in which local option was in force, ordered a gallon of whisky from the above defendant at Kansas City, Missouri. It was sent in a package C. O. D., and Morton paid the express agent the price therefor at the time it was *delivered* to him, and the agent sent the money to said defendant at Kansas City. Our Court in Banc held, that Kansas City was the *place* of sale; that the sale was complete when the liquor was shipped *there* and that defendant did not violate the Local Option Law of Webster County.

Turning to the charging part of the present petition, we find that it is averred: (1) That defendant daily sells and ships into Adair County, Missouri, where local option exists, to divers persons, large quantities of beer, which is intoxicating; that it has been so selling and shipping for a long time and will continue to do so unless restrained therefrom. This paragraph taken by itself, does not state the semblance of a cause of action for several reasons: (a) Because, section 7228, Revised Statutes 1909, authorized any person in Adair County to order liquor for his own use, or that of his family where it is sent directly to him; (b) the defendant was authorized to sell beer at Quincy, Illinois, to any of the last named persons, without violating any law; (c) in the absence of any charge to the contrary, it cannot be *presumed*, that defendant was violating any law in shipping beer to persons in said county.

(2) It is charged in the petition that by reason of the *above* shipping of beer into said county, *divers persons* are *enabled* to sell, barter and give away said beer, in said county, contrary to said Local Option Law; that by reason thereof, said defendant is *assisting* and *enabling such persons* to sell, by retail, in said county, such intoxicating liquors and thereby maintaining *public nuisances* throughout said county. This paragraph signally fails to state any *facts*, which even *remotely*, tend to show that defendant violated any law when it

sold beer to said parties at Quincy; or that the purchasers thereof were not lawfully entitled thereto when received. When the defendant delivered the beer on board the car at Quincy, directed to the person who had ordered the same, the sale was complete, and if any one *assisted* in establishing a nuisance by reason of the delivery of said beer in Adair County, it was the carrier, which transported the same, and not the defendant. Our court in Banc, speaking through Judge BOND, in which all the members of the court concurred, handed down an opinion a few days since, in State ex rel. C. B. & Q. Railroad Co. v. Woolfolk, 269 Mo. 389, in which it was held, that an injunction would not lie against the *carrier* for delivering intoxicating liquors to individuals, in a local option county; and that the injunctive process could not be legally issued out of a court of chancery to enforce the provisions of a criminal statute, etc. If the act of the railroad company in delivering beer in a local option county *is not the proximate cause of a nuisance thereafter created by the purchaser* of such liquor, neither is the act of defendant, in making a *valid sale* to a *legitimate purchaser*, even if the latter, in conjunction with others, should thereafter create a public nuisance by drinking and raising a disturbance. This charge, like the preceding one, fails to state any facts which could sustain a recovery in this action.

(3) The petition avers, that by reason of the sale of such intoxicating liquors in said county, large crowds of *idle* and *turbulent* people, addicted to the use of intoxicating liquors assemble at the places where such intoxicating liquors are kept and sold, to the great injury to society and the general welfare of the people of said county; that unless defendant is restrained from selling and shipping said liquors in said county, such *nuisances* will continue to be maintained in said county and the interest of the people and the general welfare of the public jeopardized thereby.

The names of the vendors of said liquor, and the *places where they are supposed to have sold the same*, are not mentioned. It is not averred that defendant, or

any of its agents, *knew* anything about the congregation of said *idle* and *turbulent* citizens aforesaid, at the places where the alleged public nuisances were created. It is not alleged, that when said public nuisances were committed, any of these *idle* and *turbulent* citizens, *were under the influence of liquor, or using any of that alleged to have been sold by defendant, or any one else.* We are of the opinion, that the mere *assembling of idle and turbulent citizens at a given place where liquor is sold, does not constitute a public or private nuisance, unless it appears that they have been guilty of some misbehavior which is sufficient under the law to produce such result.* But even if idle and turbulent men of said county had *met*, at a place where liquor was sold in contravention of law; and even if they had *used* a portion of said liquor; had become *intoxicated and created a disturbance* by reason thereof, this does not militate against the right of defendant to sell its beer at Quincy, to legitimate customers, and especially when it does not appear from the petition, that any of these alleged *idle* and *turbulent* men, or the vendors of intoxicating liquors, had bought beer from the defendant.

If the *divers persons* who are selling intoxicating liquors illegally in Adair County, have a public place for doing this kind of business, then we are at a loss to understand why they have not been prosecuted and said business suppressed through the criminal laws of the State. It is fair to assume, in the absence of any allegation upon the subject, that these *divers persons* and vendors of liquor, must have been engaged in this disreputable business in *secret places*, and in *this manner* were evading criminal prosecutions. In either event, it was necessary for the petition to contain by way of *scienter*, that defendant had *notice* that these *divers persons* were engaged in such illegal practices, and aided or assisted them in carrying on such business. But even this would constitute no grounds for calling upon a court of chancery for relief, when just as adequate a remedy was afforded at law. In order to invoke the aid of the chancellor, in the issuance of injunctive process, it

is alleged that *idle* and *turbulent* people addicted to the use of intoxicating liquors, assemble at the above places, where the liquor is illegally sold or given away, to the injury of the public, but unless they are alleged to have been *drinking beer* or other intoxicating liquor, and *put into execution* their turbulent dispositions, to the detriment of the public, we do not understand how their *mere presence*, in connection with the illegal disposition of intoxicating liquors, without taking any part in the proceeding, can be considered, in contemplation of law, a public nuisance, so as to justify a court of equity, in superseding the criminal law and abating same.

The petition therefor, taken as a whole, undertakes to restrain defendant from engaging in its legitimate business, in selling to persons authorized by law to purchase its goods, for the *alleged* reason that it *enables divers persons, who have no connection with defendant*, to sell intoxicating liquors in violation of the Local Option Law, *with those present*, who are *idle and addicted* to the use of intoxicating liquors. It is not averred, *that defendant sold its beer to any of these divers persons who are idle and addicted to the use of intoxicating liquors, nor that it sold to any of those persons who were selling intoxicating liquors in violation of law.*

In discussing this subject, Judge BOND, in State ex rel. C. B. & Q. Railroad Co. v. Woolfolk, 269 Mo. l. c. 396, very clearly and forcefully stated the law applicable to the present controversy, as follows:

“In order to connect the relator with the public nuisance, alleged in the petition to have resulted from the drunkenness and disorder referred to, it was indispensable that the plaintiff should show that these were caused directly by the mere act of the defendant in transporting and delivering such commodities in Pike County, or that it participated in bringing about this condition. The subsequent happening of such a state of intoxication did not establish that it was caused by the act of the relator, there being no allegations that it was concerned either in the sale or distribution of intoxicating liquors to or among the people of this portion of Pike

County, or that it did any act which necessarily created a state of general drunkenness and disorder at the places referred to in the petition."

In the same opinion, it is said:

"It will be seen from this language of the petition that the petitioner wholly fails to set forth any facts showing that the things done by relator were the *proximate and efficient cause* of the creation of a public nuisance. No court of equity can enjoin any transaction however violative of the criminal law on the part of the defendant, which does not bear such a causal relation to the public nuisance averred in the petition."

In view of the above clear exposition of the law, in respect to the matter under consideration, we do not deem it necessary to pursue this discussion further. We therefore hold that the petition fails to state a cause of action for injunction and that this court can determine its sufficiency although no attack was made thereon in the trial court. [Titus v. Development Co., 264 Mo. l. c. 240, 174 S. W. l. c. 435, and cases cited; Carpenter v. St. Joseph, 263 Mo. l. c. 711; Chandler v. Railroad, 251 Mo. l. c. 599-600; Hudson v. Cahoon, 193 Mo. 547.]

II. Even if the petition had stated a cause of action, yet, under the agreed statement of facts heretofore set out, in view of what we have held in the preceding proposition, no recovery can be had.

We therefore reverse and remand the cause, with directions to the lower court to set aside its judgment heretofore rendered, and to dismiss the plaintiff's bill.

Brown, C., concurs.

PER CURIAM:—The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court. All of the judges concur.

SHERMAN HANDLIN, Appellant, v. EDWIN BURCHETT.

Division One, February 20, 1917.

1. **LIMITATION: Cause Originating in Other State.** A cause of action originating in another State if barred in that State when instituted in this State, is by our statute (Sec. 1895, R. S. 1909) barred in this State.
2. ———: ———: **Tolling Statute: Commencement of Action.** Where the Iowa statute provides that the limitation for actions shall be extended in favor of minors, "so that they shall have one year from and after the termination of such disability within which to commence said action," the right to institute a suit cannot be confined to commence one suit only, but the minor may institute and dismiss and reinstitute his suit as many times as he sees fit within the limitation fixed by the tolling statute, which declares that "if, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall be held a continuation of the first." The second action is declared to be continuation of the first in order to extend the limitation statute by which it would otherwise be barred.
3. ———: ———: **Minor's Suit: Case Stated.** The cause of action originated in Iowa, where both plaintiff and defendant resided. On June 5, 1908, plaintiff's leg was broken and defendant treated him for the injury. Plaintiff became of age August 14, 1911, and in May, 1912, sued defendant in Iowa for malpractice, and that action was voluntarily dismissed on December 19, 1912. On August 12, 1912, he began this suit in the circuit court of Putnam County, Missouri. The Iowa statute says that such actions shall be brought within two years; that, if plaintiff fails in the first action begun, he may bring a new one within six months thereafter, and "the second shall be held a continuation of the first;" and that "the times limited for actions herein shall be extended in favor of minors, so that they shall have one year from and after the termination of such disability within which to commence said action." *Held*, that this action is not barred.

Appeal from Putnam Circuit Court.—*Hon. George W. Wanamaker*, Judge.

REVERSED AND REMANDED.

Platt Hubbell, Geo. H. Hubbell and John C. McKinley for appellant.

(1) Two years is the period of limitations in Iowa for malpractice—except for plaintiff's minority. Code of Iowa, secs. 3447, 3453; *Fadden v. Satterlee*, 43 Fed. 568. Plaintiff has one year after attaining his majority—one year after August 14, 1911—within which to file this suit. Since plaintiff filed his suit on August 12, 1912, he has brought his suit within the legal time and has a right to maintain his action in Missouri. Two days before the expiration of the one year, is just as good in law as two months. *Tucker v. Stewart*, 147 Iowa, 294. (2) An action for malpractice is transitory and may be prosecuted any where the defendant can be found. 22 Am. & Eng. Ency. Law, p. 1378; *Steed v. Harvey*, 18 Utah, 367; *Bryant v. McClure*, 44 Mo. App. 554; R. S. 1909, sec. 1754. The Iowa statute of limitations governs. R. S. 1909, sec. 1895. (3) Filing of the petition, alone, avoids the bar of limitation. *McGrath v. Railroad*, 128 Mo. 1; *McCormick v. Clopton*, 150 Mo. App. 129; *Mound City v. Castleman*, 187 Fed. 925; R. S. 1909, sec. 1756; *State ex rel. Brown v. Wilson*, 216 Mo. 292.

Wade, Dutcher & Davis, N. A. Franklin and E. M. Harber for respondent.

A cause of action for personal injury is barred in two years. Code of Iowa (1897), sec. 3447. The plaintiff by voluntarily dismissing his action in Iowa, where the court had jurisdiction, could not recommence it there, and said cause of action ceased to exist anywhere. Code of Iowa (1897), sec. 3455; *McCoy v. Railway*, 134 Mo. App. 622. The voluntary dismissal of the plaintiff's cause of action in Iowa was negligent within the meaning of Sec. 3455, Code of Iowa (1897); *Archer v. Railway Co.*, 65 Iowa, 611. If the plaintiff had the right to commence his suit in Missouri at the time he did by negligently thereafter dismissing his cause of action in Iowa, he destroyed his cause of action and he cannot have

judgment on a destroyed cause of action in the State of Missouri. Sec. 1895, R. S. 1909.

GRAVES, J.—Plaintiff sues the defendant, a physician, for malpractice. The suit was brought in the Putnam Circuit Court by the filing of a petition on August 12, 1912. For the determination of the single question involved here, a very short statement will suffice. Both plaintiff and defendant are residents of Iowa. On June 5, 1908, when seventeen years old, the plaintiff suffered an injury by way of a fracture of the femur in his right leg. Defendant treated him for that injury. Plaintiff became of age August 14, 1911. In May, 1912, the plaintiff sued the defendant on the same cause of action in the district court of Wayne County, Iowa. By answer the defendant avers, among other things:

“That said cause was continued in said district court of Wayne County, from time to time, until the 19th day of December, 1912, when plaintiff voluntarily and negligently dismissed and failed and refused to prosecute same.”

The defendant duly plead the several statutes of Iowa as to limitations for bringing actions in that State and paragraph 3 of section 3447, Statutes of Iowa, 1897, reads:

“Those founded on injuries to the person or reputation, including injuries to relative rights, whether based on contract or tort, or for a statute penalty, within two years; and those brought to set aside a will, within five years from the time the same is filed in the clerk’s office for probate and notice thereof is given.”

Defendant urges that the only modification of this paragraph 3 of section 3447, is found in section 3455 of said statutes, which reads:

“If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first.”

The defendant urges that by reason of the dismissal of the suit in Iowa, that fact alone finally terminated plaintiff's cause of action, and says that by reason of our statute, section 1895, Revised Statutes 1909, he cannot maintain a suit in this State. Said section 1895, reads:

“Whenever a cause of action has been fully barred by the laws of the state, territory or country in which it originated, said bar shall be a complete defense to any action thereon, brought in any of the courts of this State.”

By reply plaintiff averred that said section 3455, supra, of the Iowa Code, had no application to his case, because he was a minor, and had one full year after reaching his majority to bring his action, and had this right, irrespective of such section. Plaintiff plead specifically section 3453 of the Iowa Code, reading thus:

“The times limited for actions herein, except those brought for penalties and forfeitures, shall be extended in favor of minors and insane persons, so that they shall have one year from and after the termination of such disability within which to commence said action.”

Defendant filed motion for judgment on the pleadings and this motion was sustained and judgment entered for defendant. From such judgment the plaintiff brings this appeal.

I. The cause of action having originated in the State of Iowa, if it was barred in that State, when instituted in this State, there can be no recovery by the plaintiff. Our statute, section 1895, Revised Statutes 1909, quoted in the statement of facts, settles this question, and it is not contended otherwise by distinguished counsel for plaintiff. We start our consideration of the case with this question out of the way. Other questions must abide the construction of the Iowa laws.

II. This whole matter turns upon the question as to whether or not under the Iowa laws the plaintiff had a live cause of action, and one which could have been enforced in Iowa, at the time he instituted his suit in Missouri. If under the Iowa laws he had lost the right of action, in Iowa, prior to August 12, 1912 (the date of filing his suit in Missouri), he has no right of action here.

By the third clause of section 3447, Code of Iowa, 1897, an action for malpractice as to adults is barred in two years. [Fadden v. Satterlee (Iowa case), 43 Fed. l. c. 569.]

It is not seriously contended, however, that this statute is not tolled by the provisions of section 3453, in so far as minors and insane persons are concerned. The clear reading of the law shows that the minor has one full year in which to bring his action after attaining his majority. This matter does not seem to be seriously disputed by able counsel for the defendant. They state their position thus:

"Our theory of this statute is that the only right it conferred upon the plaintiff during the year next following his majority was the right to commence his action, and when he commenced his action in Iowa he exhausted every right which the laws of Iowa gave him except the right to prosecute said action so commenced to final determination. This statute did not confer upon him the right to commence and dismiss his action as many times as he saw fit during the year following his majority."

We regret that we have no express ruling from the Supreme Court of Iowa upon the point urged. In the absence of such we will have to give our own construction to the statutes. We do not agree with defendant, that the only right conferred by section 3453 of the Iowa Code is the mere right of *once* instituting the suit. We have statutes in this State tolling our statutes of limitations. We have one as to minors, and no one ever thought otherwise than that the minor had the right to institute and reinstitute his suit as many times as he saw

fit, provided of course the suits were within the time granted by the tolling statute. We see no reason why the Iowa statute, section 3453, should not be so construed. The minor might institute his suit the first day after reaching his majority, and afterward voluntarily dismiss it, but he might again bring his suit the last week of the year, and not be barred. Such has been our conception of our own statute, and such is the reasonable construction of the Iowa law. But it is urged that section 3455 of the Iowa Code precluded this construction. That we may have the language before us, we quote again this section. It reads:

“If, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, fails therein, and a new one is brought within six months thereafter, the second shall, for the purposes herein contemplated, be held a continuation of the first.”

This section is found in the second chapter of the Code of Civil Procedure, and the chapter is entitled, “Of Limitation of Actions.” In the chapter are sections prescribing limitations of actions and sections tolling such limitations in given cases.

To our mind this section 3455 is a section further tolling the statute of limitations under certain circumstances, rather than one limiting the time to bring suits. Note its language “the second shall, for the purposes herein contemplated, be held a continuation of the first” suit. Why declare the second suit a continuation of the first, except to make it obviate the statute of limitations, and such tolling as may have been engrafted by other sections?

Let us make it clear by illustration. Suppose A sues B on the last day permissible under the statute of limitations. Then suppose after the full time has run he tries his case, and without negligence on his part, he, to use the language of the statute, “fails therein,” then within six months he can reinstitute his suit, and such second suit shall “for the purpose herein contemplated be held a continuation of the first.” Why shall it be so

held, save and except to toll or obviate the Statute of Limitations?

If the general Statute of Limitations is tolled for given reasons (in the case at bar on account of minority) the period prescribed in the tolling statute is just as much the time in which actions (of the stated class) may be instituted, as is the period named in the general Statute of Limitations. To make plain our views we further illustrate. Under the general statute of limitations actions for malpractice in Iowa are barred in two years. Minors, however, by the tolling statute, have one year from reaching their majority in which to bring their actions. Now, A, a minor, sues B for malpractice within ten days of the expiration of his 22nd year. The action is tried, and without negligence on his part, he fails of judgment, then section 3455 would step in and give him the right to reinstitute his suit within six months and such reinstituted suit should be deemed as a continuation of the former suit, brought within the time of limitations. In other words, that statute would further toll the statute giving the right to sue within one year after reaching majority. In other words this statute confers additional rights upon those who have not been guilty of negligence in the trial of their cases. If he has been negligent in the prosecution, this further tolling is not granted. It is clear to us that this section 3455 never was intended to preclude the minor's right to bring his action at any time within the year, nor preclude him from dismissing his action, and reinstituting it, provided the new suit was brought within the year. From these views it follows that the judgment *nisi* should be reversed and the cause remanded to be proceeded with in conformity to this opinion. It is so ordered. All concur.

**T. L. WRIGHT LUMBER COMPANY, Appellant, v.
RIPLEY COUNTY.****Division One, February 20, 1917.**

1. **CONVEYANCE: Island in River: Not Surveyed: Reservation.** An unrestricted deed conveying land bordering on a river, or a Government patent conveying land adjacent to a non-navigable river, conveys all accretions thereto; and a patent conveying by Government subdivisions lands bordering a non-navigable river conveys all land between the meander line of the shore and the middle thread of the river, unless previous to the issuance of the patent the Government surveyed such lands as governmental subdivisions, or expressly reserved them when not surveyed.
2. **NAVIGABLE STREAMS: Current River: Judicial Notice.** The court takes judicial notice of what streams are navigable and what are not navigable. Current River is not a navigable water of this State, and will not be conceded to be such although appellant admits it to be in his brief.
3. **APPELLATE PRACTICE: Inadvertent Admission in Brief.** An admission in the record by counsel for appellant which is contradictory of the whole theory of his case and of his brief and argument based upon a contrary fact, will be considered on appeal as having been inadvertently made, or as a clerical error in the writing or printing of the record.
4. **PUBLIC LANDS: Priority of Field Notes.** The field notes of United States surveys of public lands made prior to their conveyance to the State or to private persons, will control in ascertaining corners and lines, even though the monuments established by the surveys cannot be found.
5. **———: Island in Current River.** A small island of a few acres in Current River, east of the middle thread of the river, existing prior to 1821 when the Government surveyed the surrounding lands, the field notes showing meander lines running along or near the banks of the river, but neither crossing nor touching the island and the survey in no wise mentioning or including but entirely ignoring it, was included in the patent of the fractional Government subdivision of the shore land on the east bank made in 1849, which did not reserve it. It was not reserved and relinquished to the State upon the admission of Missouri to the Union.
6. **———: ———: Purpose of Meander Lines: Include Islands and Overflow Lands.** Meander lines run by a Government survey along

or near the margin of a non-navigable stream were run for the purpose of ascertaining the exact quantity of upland to be charged for, and not for the purpose of limiting the title of the patentee to such meander lines. Low and overflow lands and small islands within the banks of such a river were included by a patent conveying the land by Government fractional sub-divisions.

7. **SURVEYS: No Established Corner.** A survey which does not begin at a corner established by the Government, or a corner established as required by Sec. 11322, R. S. 1909, though it otherwise pretends to follow field notes from another corner assumed to be right, is not admissible in evidence, and cannot be used to discredit an official survey made in pursuance to an order of the circuit court under the mandate of Secs. 10184 and 10188, R. S. 1909.

Appeal from Cape Girardeau Circuit Court.—*Hon. Frank Kelly*, Judge.

REVERSED AND REMANDED.

Chas. B. Butler for appellant.

(1) When the Government of the United States has conveyed its lands along the bank of the river and has sold and conveyed such land by Government subdivisions, its patent conveys all the land between the meander line and the middle thread of the river, unless previous to such patent it has surveyed such lands as governmental subdivisions or expressly reserves them when not surveyed. *Jeffries v. Land Co.*, 134 U. S. 178; *Covley v. Golden*, 117 Mo. 33; *Stoner v. Royar*, 200 Mo. 444. (2) Field notes of United States surveys of public lands will control in ascertaining locations, even though the monuments established by the Government surveyor cannot be found. *Bradshaw v. Edelen*, 194 Mo. 640; *Carter v. Hamback*, 139 Mo. 243. (3) The corners established by United States surveyors in surveying public lands are conclusive as to the actual location of the boundary lines of sections and such subdivisions thereof are authorized by the laws of the United States. *Federetzie v. Baker*, 193 Mo. 228. (4) A riparian owner on a navigable stream owns to the low watermark. *Frank v. Goddin*, 193 Mo. 390; *Coveley v. Golden*, 117 Mo. 33. (5) Islands in a stream belong to the holder of

Lumber Co. v. Ripley County.

title to lands under adjacent waters. *United States v. Chandler-Dunbar Co.*, 209 U. S. 447.

James F. Fulbright and *Chas. L. Ferguson* for respondent.

(1) The United States relinquishes to each State, upon its admission to the Union, all proprietary interest in the soil under the waters of the navigable rivers and lakes, and all proprietary interest in the beds of navigable rivers and lakes, as incidental to the sovereignty of the State. *Pollard v. Hogan*, 3 How. 212; *Hardin v. Shedd*, 190 U. S. 519; *Cooley v. Golden*, 117 Mo. 51. (2) The title to and ownership of an island in a navigable river which at the time of the admission to the Union of the State in which such island is situate was small, of no apparent value, unsurveyed by the Government and which the Government surveyors did not deem of sufficient size and value to survey, passes to the State as a part of the bed of the river. *Webber v. Axtell*, 94 Minn. 375; *United States v. Chandler-Dunbar Co.*, 209 U. S. 447; *Railroad v. Butler*, 159 U. S. 87; *Whitaker v. McBride*, 197 U. S. 510. (3) The proprietary rights in the beds of navigable streams may be reserved by the State or the ownership of the beds of navigable streams may be relinquished by the State to the riparian owner, the extent of the riparian owner's grant being construed and controlled wholly by the local law of the State as established by its Legislature or courts of final resort. *Packer v. Bird*, 137 U. S. 661; *Barney v. Keokuk*, 94 U. S. 324; *Hardin v. Jordan*, 140 U. S. 372; *United States v. Chandler-Dunbar Co.*, 209 U. S. 447; *Railroad v. Butler*, 159 U. S. 87; *Kaukanna Co. v. Green Bay & Miss. Co.*, 142 U. S. 254; *Shively v. Bowlby*, 152 U. S. 1. (4) In Missouri the riparian owner of land bounded by a navigable stream owns only to low watermark. *Benson v. Marrow*, 61 Mo. 351; *Cooley v. Golden*, 117 Mo. 34; *Perkins v. Adams*, 132 Mo. 131; *McBane v. Johnson*, 155 Mo. 191; *Moore v. Farmer*, 156 Mo. 47; *State ex rel. v. Longfellow*, 169 Mo. 109; *Frank v. Goddin*, 193 Mo. 390; *Stonar v.*

Royar, 200 Mo. 451. (5) The general rule adopted by both State and Federal courts is that meander lines are not run as boundaries of the tract surveyed, but for the purpose of defining the sinuosities of the banks of the stream and as a means of ascertaining the quality of land. The stream or other body of water and not the meander line as actually run on the ground is the boundary. 5 Cyc. 898; *Railroad v. Schurmen*, 7 Wall. 272; *Horne v. Smith*, 159 U. S. 40; *Hardin v. Jordan*, 140 U. S. 371; *Jefferis v. Land Co.*, 134 U. S. 178; *Frank v. Goddin*, 193 Mo. 390. (6) In Missouri the riparian owner owns only to low watermark and where the stream is the boundary of a grant, it remains the shore owner's boundary no matter how far the water line shifts either inwardly or outwardly. *Frank v. Goddin*, 193 Mo. 190.

WOODSON, J.—The plaintiff brought this suit in the circuit court of Ripley County, under section 2535, Revised Statutes 1909, against the defendant, to ascertain and decree title to the land described in the petition—the same being a small island in Current River, consisting of about five and one-half acres, near the city of Doniphan, Missouri. The judgment was for the defendant, and the plaintiff appealed the cause to this court.

The plaintiff's evidence tended to show that the United States patented the land on January 1, 1849, to Lemuel Kittrell, and that through mesne conveyances the plaintiff, on October 27, 1906, acquired title to the same. That the island in question was in existence at the time, and long prior to 1821, the date of the admission of Missouri into the Union. That it lies in said river opposite the southwest fractional quarter of the northeast fractional quarter of section twenty-seven, township twenty-three north, range two east, in Ripley County, Missouri.

D. K. Ponder testified that in the year 1842 the island then existed, and that then there were trees a foot and one-half through growing on it.

Lumber Co. v. Ripley County.

Thomas Mabrey testified that the island was there in 1859 and has been there ever since.

T. L. Wright testified that he had known this island for forty years and that there were standing trees on it more than two hundred years old; and that the timber on the island and on the adjacent land showed no difference as to age.

The photographs introduced in evidence tend to show that the island is not of recent origin.

The field notes of the survey made by the United States in 1821 do not show that this island existed, but the report of this survey does not show that the meander line ran across or up the island in the direction the river runs.

A report of a survey made by W. H. Hippolite, a civil engineer, by order of the circuit court of Ripley County in 1895, to be used in another case involving land in this same vicinity, requiring the establishment of the certain lines and corners made and established by the United States in 1821, was introduced in evidence. (While the record does not, in so many words, state that this survey was ordered made under section 10207, Revised Statutes 1899, providing for the establishment of lost Government corners, etc., yet that fact, I gather therefrom, is clearly inferable.)

The report, which is quite lengthy, but in so far as it is here material, reads as follows:

“Dear Sir:

“As per your order of court of the April term, 1895, ordering me to make an accurate survey in the case of D. K. Ponder v. J. F. Page, beg to advise that I have this day completed said survey and made the following report of same:

“In company with the plaintiff and defendant, in the case, together with a number of old residents of this (Ripley Co.) I obtained all available information of Govt. corners and witness-trees in the vicinity, by actual research on the premises, and after getting which, began my survey for the accurate location of the east and west quarter section line of section 26, township 23,

North, range 2 East, of the 5th P. M., said line being the one in dispute.”

Then follows a long report of the courses, distances, corner stones, witness-trees, etc., found by him, and how from those courses, distances, stones and trees he established the section line above mentioned and the quarter section corner of the southeast corner of the southwest fractional quarter of the northeast fractional quarter of said section twenty-seven.

The old corner stones, witness-trees, etc., with the new ones established by Hippolite, were shown by said report, all agreeing with the contention of plaintiff in this case.

J. H. Greason testified that he was a civil engineer, and a graduate of the Missouri University; that he made the plat offered in evidence appearing in the abstract, which is too large to be set out in this statement of the case. That he was familiar with island designated thereon; that he ran the meandering line shown on said plat indicated by a light pencil line, passing along the island up and down the river, and through stations marked thereon six and seven. That he found quarter section corner of the southeast corner of the southwest fractional quarter of the northeast fractional quarter of said section twenty-seven, before mentioned, and established by Mr. Hippolite; that he had with him Hippolite's field notes, which he followed; that when he came out on the line between twenty-six and twenty-seven, he found at the corner a Government tree, and that he ran this line, indicating, up to the northeast corner of said section twenty-seven. He then states in detail how he surveyed the river, island and lands shown by said plat; that it was correct and corresponded in the main with that of Hippolite.

That the Government field notes do not show the existence of the island; that he was familiar with the rules of the Government in surveying islands in rivers, lakes, etc., and produced and read them to the court; that he followed those rules in making the survey mentioned, except he showed the island in his plat.

Wm. M. Andrews, a civil engineer and graduate of the University of Indiana, testified that he ran the meander line of Current River in said section twenty-seven and surveyed the island in question; made the plat introduced in evidence, and that the meander line ran through stations five, six and seven on the plat, said stations being on said island; and that he took the measure of distances from the United States field notes and Hippolite's survey.

That the plaintiff and those through whom he claims title, have been in the actual, open, notorious, exclusive and adverse possession of the island for more than twenty years just before the institution of this suit, claiming title thereto, and had paid all the taxes against the same during that period.

The evidence for the defendant tended to show the following facts:

That Current River was a navigable stream; that the river runs in a southeasterly and northwesterly direction at that point with one of the channels running on the east and one on the west side of the island.

In 1821, the United States Government had surveyed and platted the lands upon each bank of the river in that vicinity. As far back as the memory of man runneth not to the contrary, the island had existed at that point. That fifty years ago it was a small, narrow strip of land, covered with small brush and trees, and in 1842 the island was about a quarter of a mile in length, running up and down the river, and about four hundred feet in width; but its exact size at the date the United States survey was made, is not shown. In later years the accretions to the island have increased its area to some ten or twelve acres.

That this island was not noted in the field notes in the United States Survey and no representation of the island was made on the plat constructed by the Government from those field notes. The island, as such, is not mentioned in the patent from the United States to Kittrell, nor in any of the mesne conveyances through which the plaintiff claims title thereto.

The defendant introduced S. P. Rodebaugh as a witness, who testified he was a surveyor and surveyed the island, ran certain meander lines, and made the plats defendant introduced in evidence. That in tracing the meander lines he did not follow those made by the United States survey, but began at a stake (presumably set by him) on the south line of said section, did not measure the distance from there to the river, nor attempt to get the correct starting point.

He was asked:

“Q. I will ask you if you went into what is supposed to be the corner of the southeast quarter of section twenty-seven, the corner that was referred to by Mr. Andrews and Mr. Greason in their testimony? A. Yes, sir.

“Q. State to the court whether there is anything to indicate that to be the corner of section twenty-seven?

A. I don't think the tree that Hippolite used is the correct tree; it stands in the wrong position, the place he calls for is too low and there is nothing but a hole cut in the tree; that is, there are no figures.

“Q. There are no evidences there to which he referred on which a man could reliably locate a corner? A. No.”

I. The question presented for adjudication in this case is, in a sense, similar to that of accretions, in this:

**Lands in
Non-navigable
River.**

an unrestricted deed conveying land on the shore of a river will also convey all accretions thereto. The same is true where the United States conveys its lands adjacent to a non-navigable river, where it sells and conveys such lands by the Government sub-divisions, its patents convey all the land between the meander line on the shore and the middle thread of the river, unless previous to the issuance of the patent it has surveyed such lands as governmental sub-divisions, or has expressly reserved them when not surveyed. That proposition has been expressly decided by the Supreme Court of the United States and by this court. [Jefferis v. E. Omaha Land

Co., 134 U. S. 178; Cooley v. Golden, 117 Mo. 33; Stoner v. Royar, 200 Mo. 444.]

In discussing this question, this court, in the case of Cooley v. Golden, *supra*, on page 54, said:

“The next inquiry in order is, what land did plaintiff’s grantors acquire from the Government under their grant of the fractional section quarters, bordering on the Missouri shore of the river? These subdivisions on the side next to the river all have a common meandering line designating the river shore. In the recent case of Hardin v. Jordan, 140 U. S. 371, Mr. Justice BRADLEY in delivering the opinion of the court says, in regard to such lines: ‘It has been the practice of the Government from its origin, in disposing of the public lands, to measure the price to be paid for them by the quantity of upland granted, no charge being made for the lands under the bed of the stream, or other body of water. The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines.’ It has frequently been held, both by the Federal and State courts, that such meander lines are intended for the purpose of bounding and abutting the lands granted upon the waters whose margins are thus meandered; and that the waters themselves constitute the real boundary. [Railroad v. Schurmeir, 7 Wall. 272; Jefferis v. East Omaha Land Co., 134 U. S. 178; Middleton v. Pritchard, 3 Scam. 510; Canal Trustees v. Haven, 5 Gilm. 548, 558; Houck v. Yates, 82 Ill. 179; Fuller v. Dauphin, 124 Ill. 542; Boorman v. Sunnuchs, 42 Wis. 233, 235; Pere Marquette Boom Co. v. Adams, 44 Mich. 403; Clute v. Fisher, 65 Mich. 48; Ridgway v. Ludlow, 58 Ind. 248; Kraut v. Crawford, 18 Iowa, 549; Forsyth v. Smale, 7 Biss. 201; Illinois Revised Statutes, secs. 2395, 2396.] . . . It has never been held that the lands under water, in front of such grants, are reserved to the United States, or that they can be afterwards granted

out to other persons to the injury of the original grantees.' "

The following cases cited in effect hold that when the United States surveys its lands along the banks of a non-navigable river, and has sold and conveyed such lands by sub-division, its patents convey the title to all the lands lying between the meander line and the middle thread of the river, unless previous to the issuance and delivery of such patent, it has also surveyed such lands as Government sub-divisions or has expressly reserved them when not surveyed. [Webber v. Boom Co., 62 Mich. 626; Fletcher v. Boom Co., 51 Mich. 277; Granger v. Avery, 64 Me. 292; Jones v. Soulard, 24 How. 41; Middleton v. Pritchard, 3 Scam. 510; Chandos v. Mack, 77 Wis. 573; Railway v. Schurmeir, 7 Wall. 272; Jefferis v. East Omaha Land Co., supra.]

The opinion then proceeds, and holds that as to navigable streams, and where the tide ebbs and flows, the rule is otherwise; the patent only conveys the land to the shore line.

In the case of Stoner v. Royar, supra, this court held that Congress did not by act prior to 1855 vest in the State the title to surveyed islands in the Missouri River, but clearly indicating that if unsurveyed or unreserved it would have conveyed it.

But counsel for defendant contend that under the admission of counsel for plaintiff that Current River is a navigable stream, the company, under the authorities cited, had never acquired any title to the island in controversy, and therefore the judgment of the trial court was correct and should be affirmed.

It does appear from the record that counsel for plaintiff made that admission, yet the whole theory of his case, brief and argument is based upon the fact that said river is not navigable, so we are driven to the conclusion that the admission was inadvertently made, or as written and printed was a clerical error, and should state that it was a non-navigable river; otherwise, counsel would be placed in the nonsensical position

of making one admission and citing authorities in support thereof which destroy every vestige of his case.

But independent of that, counsel for both parties know, and this court will take judicial notice of the navigable and non-navigable waters of this State. We had this question before this court in the case of *State ex rel. v. Taylor*, 224 Mo. 393. On page 483, the court said:

“And since this district was organized subsequent to the passage of the Act of 1903, it becomes unnecessary for us to determine whether or not section 8278, Revised Statutes 1899, authorized the county court to construct, straighten, widen, alter or deepen the Chariton River, a *natural stream*, etc., for the reason that said section was not then in force, but the Act of 1903 which in express terms authorized its improvement, provided it was not a navigable stream within the meaning of that act.

“But counsel for relators insist that even though the court should be of the opinion that the Act of 1903, p. 234, authorized the county court to improve a natural stream, still that act had no application to the Chariton River, for the reason that the act itself in express terms exempts its application to all navigable rivers, to which class they contend Chariton River belongs.

“There is no pretense that said river is in fact navigable, but the contention is that it is in law a navigable stream. The basis of this contention is an act of the Legislature passed in the year 1845 (Laws 1845, p. 299). That act reads as follows:

“‘That the Grand Chariton River is hereby declared a public highway from its mouth, where it empties into the Missouri River, to the northern boundary of the State of Missouri; provided, however, that this act shall not be so construed as to affect the right of any person or persons who now have, or may hereafter have, a grist-mill or other machinery constructed on said river.’

“There is nothing in this record nor in any public document or history of the State, to which our attention

has been called, showing that the Chariton River in question is the Grand Chariton mentioned in the Act of 1845. It might be argued that they are one and the same river, for the reason that there is but one Chariton River in the State, and therefore the river in question was the river the Legislature had in mind. Assuming that to be true, the question then is, is the Chariton River a navigable river within the meaning of the Acts of 1903 and 1905?

“The Act of 1845 does not so declare it to be a navigable river. The declaration there is that it is ‘a public highway.’ Mr. Webster defines the word ‘highway’ as ‘A public road; a way open to all passengers. Syn.—Way; Road; path; course.’ And he defined the word ‘navigable,’ as, ‘admitting of being navigated; affording passage to vessels—as a navigable river.’

“The substance of the legal definition of the latter word, as given by Mr. Burrill, is, by the common law, a river is considered navigable only so far as the tide ebbs and flows into it. That is also the doctrine in several States, but not of this State. Here all streams which are actually capable of floating and of permitting the passage of ordinary boats upon the bosom of their waters are considered navigable rivers. [Hickey v. Hazard, 3 Mo. App. 480; O’Fallon v. Daggett, 4 Mo. 343.]

“One of the elementary rules of statutory construction is, the courts should give to the words of the statute their plain or ordinary and usual meaning, the presumption being that the Legislature used them in that sense.

“In the light of these definitions and well established rules of interpretation, can it be said that the Legislature intended to declare the Chariton River to be navigable by the use of the words in the Act of 1845 ‘a public highway?’ We think not, principally for the reason that it was not navigable as a matter of fact, and to so construe the act in question would be to convict the Legislature of not only doing a useless thing, but

Lumber Co. v. Ripley County.

also of enacting a most foolish statute, which is not tolerated by the canons of statutory construction.

"If we view this act in the light of numerous other acts of similar import, enacted about that time, it will show that the Legislature was simply trying to declare the channels of all such streams to be public highways so as to preserve the free flow and to preserve the use of the waters thereof unto the millers who had constructed grist-mills or other machinery along their banks.

"The following among other acts are similar in character: Acts of 1839, pp. 81, 87, 88; Acts of 1841, pp. 114-115; Acts of 1843, pp. 69-70; Acts of 1848, pp. 120-121; Acts of 1855, pp. 474, 538 and 625.

"The Act of 1839 declared all that part of Fourche-a-curtois Creek below Sawyer's Mill to be a 'public highway.' And the Act of 1841 declared Appel Creek from its mouth to Ingram's Mill to be 'a navigable stream,' and so on to the end of the list. Almost invariably these acts refer to some mill or mill-dam; and some of them, after declaring the stream to be navigable or a public highway, then, in the same section, expressly authorize the construction or maintenance of a mill-dam or draw across the same, for the purpose of propelling mills and other machinery, according to the general law of the State in relation to mills and mill-dams.

"When we consider the size, location and uses to which those streams were then being put, the conclusion is irresistible that the Legislature never once thought of constituting and declaring them and like streams to be public highways in the sense of navigability. No ordinary boat could ply any of them and but few of them at ordinary stages of water were capable of floating an ordinary canoe, while some of them during the dry season would scarcely float a pill box. To hold under this state of facts that it was the design of the Legislature to constitute and declare these small rivers and creeks to be navigable streams within the ordinary meaning of those words would be absurd and a reflection upon the intelligence of the Legislature and upon the court that should

so hold. But, as before suggested, the Legislature intended by those and similar acts to grant or license mill-owners along these streams who then had or might thereafter construct grist-mills along any of them, to construct and maintain mill-dams across the same for the purpose of conserving the waters thereof and generating power thereby with which to propel their mills or other machinery. This is the sensible view to take of all such acts, and the authority to construct and maintain dams across them negatives the idea that they were to be kept open as public highways in the sense of being navigable rivers. Even if navigable (which they were not) before the bridges authorized to be constructed were built, clearly they would not be after those obstructions were thrown across them. The construction and maintenance of bridges across these small streams is absolutely inconsistent with the idea of their navigability.

"We, therefore, hold that the Chariton was not a navigable river within the meaning of said Acts of 1903 and 1905, authorizing the organization of drainage districts and the construction of drains as provided for thereby. Consequently, we also hold that neither of said acts exempted the Chariton River from the operation of the drainage laws of the State."

The opinion then proceeds to consider the proposition as to whether or not the Legislature of this State had the authority to declare that river a navigable stream, etc.

The Act of February 24, 1855 (Laws 1855, p. 181), declaring Current River a navigable stream is similar to the acts before mentioned; also to many other acts of the Legislature declaring numerous other small streams and creeks of the State navigable.

We are, therefore, of the opinion that even though it be conceded that the admission regarding Current River being navigable, was not a clerical error, yet as before stated, it is not in fact or law a navigable stream. It might as well be contended that an admission to the effect that the Missouri River is not navigable, would thereby wipe out the law of the State regarding such

streams, as to wipe it out by admitting that Current River is navigable.

The State has more than a passive interest in such rivers; they play an important part in lands and land titles also regarding the rights of the State to use them in connection with the construction of proper levees and drains for the protection of the public health and against high water and overflow, etc.

Current River is not navigable and we are not going to let this case go off on the admission that it is, and hereafter be plagued in the future by an opinion of this court holding that it is such, because, perhaps, counsel for plaintiff in this case admitted it to be such.

Returning to question under consideration before this digression:

It is well settled in this State that the field notes of the United States surveys of public lands made prior to their conveyance to the State or to private persons, will control in ascertaining locations of corners, lines and locations, even though the monuments established by the United States cannot be found. [Bradshaw v. Edelen, 194 Mo. 640; Carter v. Hornback, 139 Mo. l. c. 243.]

In the case at bar, the report and surveys made by Hippolite and other engineers introduced in evidence by the plaintiff, were based upon the field notes, meander lines and such of the monuments then existing, established by the United States Government, which show that the island in controversy, which all the evidence tended to show was in existence and had been long before the date of the admission of this State into the Union, had never been surveyed by the Government, and said field notes and monuments themselves clearly show that the meander lines made by the United States ran along or near the banks of Current River, and did not cross, touch or undertake to survey this island in any manner whatever, but ignored it just as the Government ignores all other low and overflowed land lying below the meandering lines, and within the banks of such a river. As a rule, such lands are so small and

comparatively worthless that they are not considered by the Government in making surveys of the public lands, and when sold no charge is made for them. Of course, if there are large bodies of such lands worthy of consideration, then they are surveyed as other public lands are, and sold and conveyed as such.

The only evidence tending to disprove the foregoing facts is the testimony of S. P. Rodebaugh, a witness introduced by defendant, and a survey of the island made by him.

This evidence is wholly without probative force, for the reason that he stated that he did not start his survey from a corner established by the Government, nor a corner established by him, as required by section 11322, Revised Statutes 1909, but from a stake mentioned, indicated by a mark on his survey. This court in the case of *Clark v. McAtee*, 227 Mo. 152, in express terms held such a survey to be absolutely void, and not admissible as such; and for the same reason, the testimony of Rodebaugh was equally devoid of all weight, because he did not pretend to know where the true corner was, but assumed the stake mentioned was the true corner; if it was not, it being the basis of his testimony, then, of course, his testimony was worthless, the same as his survey.

To show the utter worthlessness of his testimony, he went to the length of discrediting the survey made by Hippolite, an official survey made by order of the circuit court, presumably under the mandate of section 10184, Revised Statutes 1899, as the court had no other authority to order it, and which by section 10188, Revised Statutes 1899, is made an official survey and required to be filed with the Recorder of Deeds in a well-bound book, indexed, etc., and declared to be competent evidence, etc.; and that discredit was not only based upon the starting point mentioned by him, but it was contradicted by witness-trees marked by the Government surveyors, as disclosed by their field notes and meandering lines. He disposes of the tree by simply saying: "It stands in the wrong place, the place he

calls for is too low and there is nothing but a hole cut in the tree; that is, there are no figures."

As previously stated, that tree was located as the Government witness-tree by the field notes and meandering lines made by the United States surveyors, and by a survey made by Hippolite, starting from a corner established by him, as provided for by section 11322, Revised Statutes 1909, same as section 10207, Revised Statutes 1899.

There are other questions presented and discussed, but the view we have taken of the case renders it unnecessary for us to notice them.

For the reasons stated, the judgment of the circuit court is reversed and the cause remanded. All concur.

ORRIN ROBERTSON, Appellant, v. ESTHER
ROBERTSON. .

Division One, February 20, 1917.

1. **DIVORCE: Verification of Petition: Jurisdiction.** Unless the petition for divorce is accompanied by the affidavit required by the statute, the court acquires no jurisdiction of the case.
2. ———: ———: **Unsigned Affidavit.** An unsigned affidavit is no affidavit at all, and where the statute requires an affidavit to accompany the petition, the court does not obtain jurisdiction unless the accompanying affidavit is signed by the proper party. And a divorce decree entered by default upon a petition to which an unsigned affidavit is attached, is void; and especially should an unsigned affidavit in a divorce case be held to be no affidavit at all, because many of the statements which the statute requires the affidavit to include can be known by the petitioner alone, and courts are too often imposed upon in such cases.
3. **PRACTICE IN SUPREME COURT: Certification from Court of Appeals.** When a case is certified from a Court of Appeals to the Supreme Court, upon the dissent and certification of one of its judges, all questions involved are for consideration in the Supreme Court, just as if the case was one appealable to this court in the first instance.

Appeal from Jasper Circuit Court.—*Hon D. E. Blair,*
Judge.

REVERSED AND DEMANDED (*with directions*).

C. W. Bigger for appellant.

In divorce cases "the petition shall be accompanied by an affidavit." R. S. 1909, sec. 2371. Without which the court acquires no jurisdiction, and the said affidavit must be signed by the plaintiff. *Loveless v. Hinkle*, 204 Mo. 208. An unsigned affidavit is void. *Hargadine v. Van Horn*, 72 Mo. 370; *Norman v. Horn*, 36 Mo. App. 424; *Third National Bank v. Garton*, 40 Mo. App. 120. This case, is, in point of law and fact, fully within the case of *Dorrance v. Dorrance*, 242 Mo. 625.

Griffin & Orr and *R. M. Sheppard* for respondent.

(1) In the absence of a statute or ruling of court requiring it, the signature of affiant is not necessary for the validity of an affidavit. There is no rule of Jasper Circuit Court, nor is there any statute of the State of Missouri requiring an affidavit to be signed by the affiant. *Bouvier Law Dictionary*—Title: Affidavit; 1 *Ency. Plead. & Prac.* p. 313; *Anderson Law Dictionary*—Title: Affidavit; 1 *Words and Phrases*, p. 244. "The word affidavit *ex vi termini*, means an oath reduced to writing." *State v. Headrick*, 149 Mo. 403. "The omission of affiant's signature does not affect the validity of the affidavit." *Gill v. Ward*, 23 Ark. 16; *Watts v. Womack*, 44 Ala. 605. "An affidavit in attachment is not void because not subscribed if it was duly sworn to." *Fortenheimer v. Claffin*, 47 Ark. 49; *Turpin v. Road Co.*, 48 Ind. 45; *Bates v. Robinson*, 8 Iowa, 318; *Wynkoop v. Judge*, 113 Mich. 381; *Bloomington v. Chittenden*, 75 Mich. 305. "In the absence of a rule of court or statute requiring it, the subscription to an affidavit by the affiant is not necessary." *Norton v. Hague*, 47 Minn. 405; *Brook v. Sneed*, 50 Miss. 416; *Alferd v. McCormick*, 90 N. C. 151; *City v. White*, 152 Cal. 190; *Albritton v. Williams*, 132 Ala. 647; *Smith*

v. Benton, 15 Mo. 371; Laswell v. Church, 46 Mo. 279. "The affidavit and jurat are a part of the petition." Burnes v. Burnes, 61 Mo. App. 618. "When a signature is essential to the validity of an instrument, it is not necessary that the signature appear at the end of the instrument, if the name of the party whose signature is required is written by him in any part of the instrument for the purpose of authenticating it, it is a sufficient signature." 36 Cyc. 449; Moss v. Booth, 34 Mo. 316; Schmidt v. Schmaelter, 45 Mo. 502; State v. Wilcox, 59 Mo. 176. "An instrument is signed where the name appears at the bottom, top, middle or side of a paper, if such name was intended as a signature." 25 Am. & Eng. Ency. Law, 1065. "If by mistake or inadvertence a signature is placed below the jurat this does not render it a nullity." Launius v. Coe, 51 Mo. 147. (2) Sec. 2381, R. S. 1909, prohibits a petition for review in a divorce matter, any law or statute to the contrary notwithstanding. The petition of appellant herein is a petition for a review. The prayer of appellant's petition shows that this is what he seeks to do. He asks that the judgment be set aside and that he be reinstated to his legal rights and given the privilege of answering and defending. Smith v. Smith, 164 Mo. App. 53; Salisbury v. Salisbury, 92 Mo. 683. (3) If, as appellant contends, the decree in the divorce suit was void, then that is the end of it and it does not need this action to void it. The petition of plaintiff treats the decree as being valid. If it is a valid decree then it cannot be reviewed in this sort of an action. If it is void, then it is open to collateral attack at any time. It would appear from reading the petition of plaintiff in this suit that this was an attempt to set aside a judgment in the divorce case on account of fraud. "In order to set aside a judgment for fraud even in a direct proceeding, it must appear that the fraud was practiced in the very act of obtaining the judgment." Fears v. Riley, 148 Mo. 49; Railway Co. v. Mirreiles, 182 Mo. 126; Dorman v. Hall, 124 Mo. App. 9; Smith v. Smith, 164 Mo. App. 53.

GRAVES, J.—This is an action brought for the purpose of annulling a certain decree of divorce entered in the circuit court of Jasper County in the case of Esther Robertson v. Orrin Robertson in February, 1911. The present action was instituted January 2, 1913. The petition herein charges lack of jurisdiction in the circuit court of Jasper County in the case of Esther Robertson v. Orrin Robertson. It also charges fraud in the procurement of that judgment. Upon trial the circuit court dismissed plaintiff's bill and entered judgment against him. From such judgment the plaintiff appealed to the Springfield Court of Appeals, which court by a divided opinion reversed and remanded such cause, with directions to the trial court to enter a judgment for plaintiff on his bill. One of the judges dissented and certified the case here. It therefore reaches us in due form, and is here for consideration from all angles.

In the Court of Appeals the division of the court arose upon the sufficiency of the affidavit attached to the petition of plaintiff in case of Esther Robertson v. Orrin Robertson. In that case the petition is very short, and charges as a ground for divorce:

"But the said defendant wholly disregarding his duties as the husband of the plaintiff, did on said September 16, 1908, desert and leave plaintiff and has absented himself without a reasonable cause for the space of one year, to-wit, since the 16th day of September, 1908, that ever since last named date, defendant wholly disregarding his duties as the husband of plaintiff, has failed and neglected to support plaintiff, has contributed nothing to plaintiff with which to provide for her the necessities of life."

This petition alleges defendant to be a non-resident of Missouri, and had other usual formal allegations. This petition was signed "Esther Robertson, Plaintiff." Following this signature was the following:

Robertson v. Robertson.

"State of Missouri, }
County of Jasper. } ss.

"On this 16th day of December, 1910, before me, the undersigned notary public within and for Jasper County, Missouri, personally appeared Esther Robertson to me known to be the person described in, and who executed the above and foregoing petition, who being by me duly sworn on her oath did say that she is the plaintiff in the above entitled action and that the facts in the foregoing petition are true according to her best knowledge and belief, and that the complaint is not made out of levity, or by collusion, fear or restraint between the plaintiff and defendant for the mere purpose of being separated from each other, but in sincerity and truth for the causes mentioned in the petition.

"In testimony whereof, I have hereunto set my hand and affixed my notarial seal at my office, in Joplin, Missouri, this 16th. day of December, 1910.

BEATRICE L. WHITE, Notary Public,
Jasper County, Missouri.

Commission expires Feb. 28, 1914."

It will be noted that the said Esther Robertson did not subscribe to the affidavit, and this was the bone of contention in the Springfield Court of Appeals. The majority opinion held that the circuit court, under these documents, acquired no jurisdiction in Esther's case, and that its judgment should be annulled. The minority opinion contra. Other matters will be stated, if necessity requires.

I. The majority opinion in this case is bottomed on the case of Hinkle v. Lovelace, 204 Mo. 1. c. 227. Whilst this court was divided upon some questions in that case, we were a unit in holding:

"The verification required to be made and annexed to the petition in divorce proceedings is a matter of

**Verification
of Divorce
Petition.**

substance, so much as that the court acquires no jurisdiction of the cause without it. See authorities cited under paragraph three of this opinion."

In other words we held that unless a petition for divorce was accompanied by the affidavit required by the statute, the circuit court would acquire no jurisdiction in the case. We see no reason for departing from that rule. In that case the affidavit attached to and filed with the petition, was made by an agent of the plaintiff, and we held that in law it was no affidavit at all. In other words, that the plaintiff was the only person that could make the affidavit required by the statute. The difference between that case and this case is, that in the one the agent undertook to and did make the affidavit, whilst in the other the plaintiff is averred by the notary to have sworn to the facts in the affidavit, but did not sign it. It will be observed that the Hinkle case settles the jurisdictional character of the affidavit, but does not settle the sufficiency of the instrument involved here. That matter we take next.

II. This case presents a very interesting question, and as it comes to this court upon a certification of the **Unsigned Court of Appeals**, all questions involved are **here for consideration**, as if the cause was one appealable to this court in the first instance. If the affidavit in the divorce case is insufficient to confer jurisdiction, it is because the same is not signed by the plaintiff in that proceeding. The general rule supported by the weight of the authorities, is thus stated in 2 Corpus Juris, p. 357:

"It is generally held that, in the absence of any statute or rule of court requiring a signature, if it clearly appears who made the affidavit, and the fact of his swearing is certified by a proper officer, the affidavit is sufficient, although not subscribed by the affiant."

The authorities cited do not include Missouri, however. So too we find in 1 R. L. C. 769, the general rule stated in this fashion:

"In the absence of a statute or rule of court to the contrary, it is not necessary to the validity of an affidavit that it have the signature of the affiant subscribed thereto, although all the authorities and general custom recommend as the better practice that it be signed by the affiant."

No Missouri authorities are cited by this author to support the rule. On the other hand, in both of these authorities Missouri is recognized as holding to a different view.

To start with it must be said that our statute as to the affidavit which must accompany a divorce petition (Sec. 2371, R. S. 1909) does not specifically provide for the signature of the plaintiff to the affidavit. The pertinent portion of this statute reads:

"The petition shall be accompanied by an affidavit annexed thereto, that the facts stated therein are true according to the best knowledge and belief of the plaintiff, *and that the complaint is not made of levity, or by collusion, fear or restraint between the plaintiff and defendant, for the mere purpose of being separated from each other, but in sincerity and truth, for the causes mentioned in the petition.*"

But it must be further said that the statute does require statements to be sworn to, which are in addition to the statement in the petition. We have italicized the portion of the statute making this requirement. In other words the statute requires (1) an affidavit to the effect that the matters stated in the petition are true, and (2) an affidavit as to the additional matters in the italicized portion of the statute mentioned. All of these last requirements are as to matters within the personal knowledge of the plaintiff, and most of them are things that could be known by no one save and except the plaintiff. This fact alone should require us to proceed with caution in determining what is and what is not an affidavit in a divorce case. The public interest (the third party in every divorce proceeding) would seem to require a rather rigid construction to be given the law. We can see where it could well be said that the law-mak-

ers contemplated, by the use of the word "affidavit" in this particular statute, an instrument duly signed by the plaintiff, to which a proper jurat was affixed by the officer before whom the affidavit was made. This because of the peculiar things required by the statute to be in this affidavit. It is clear that the statute does contemplate that it shall be in writing, because it must be annexed to the petition. It likewise contemplates the jurat of the officer. Does it then contemplate the signature of the plaintiff? We think so. At least that would seem to be the current views of the courts of this State. When we say that, we do not mean to say that our courts have ruled upon the precise question under the divorce statute, but we do mean that we have so ruled under other statutes. Thus in the case of *Hargadine v. Van Horn*, 72 Mo. 370, we had the exact question under the attachment statute. We have examined the old files in that case. The only trouble with the affidavit there was the absence of the signature of the affiant, as will be seen from page 2 of the abstract of record on file here. The opinion in the *Hargadine* case is decisive here. It is true that it was by a divided court, but the case stands to date. The holding was to the effect that such unsigned instrument was no affidavit, although there was the proper jurat by the officer.

BLAIR, C., with the unanimous approval of this Division, approved the ruling in the *Hargadine* case as late as the case of *Norman v. Insurance Co.*, 237 Mo. l. c. 584. True he was not discussing an affidavit in this exact shape, but he was discussing the question of jurisdiction without an affidavit. In *Hargadine's* case we had held that an affidavit without a signature was no affidavit, and thus the citation of the case. The minority opinion from Springfield Court of Appeals cites us to the case of *State v. Headrick*, 149 Mo. l. c. 403. This case simply says:

"The word affidavit, *ex vi termini*, means an oath reduced to writing. [1 Ency. Pl. and Pr. 309; 1 Am. & Eng. Ency. Law (2 Ed.), 909, and cases cited.]"

Nothing in that ruling precludes the idea that a signature must be attached to the writing. In *Norman v. Horn*, 36 Mo. App. 1. c. 424, an affidavit is thus defined:

“An affidavit is a written statement or declaration sworn to before some officer authorized by law to administer oaths, and signed at the end by the affiant or deponent. [*Hathaway v. Scott*, 11 Paige Chan. 173.]”

This definition comports with the ruling in *Hargadine's case*, *supra*.

We have cases which hold that because an affidavit in attachment may be defective in the matter of substantial statements therein, yet this fact does not defeat jurisdiction. Of this line of cases *Burnett v. McCluey*, 92 Mo. 230, is a type. But these cases do not contravene the rule that an unsigned affidavit is no affidavit at all, nor the further rule that the absence of an affidavit defeats jurisdiction. It should also be considered that in attachment proceedings there is specific statutory authority for amending defective affidavits, and the cases holding that jurisdiction is not defeated by affidavits merely defective in statements, all refer to this statute. But, as said, none of these cases go to the matter involved here. In the *Hargadine* case we ruled that an unsigned affidavit was no affidavit, and this ruling remains the rule of this court to-day. We see no good reason to depart from it. Especially do we see no good reason to adopt a different rule in divorce cases. Too often the courts are imposed upon in such cases. To require the statutory affidavit to be signed by the plaintiff is but another safeguard.

The majority opinion of the Springfield Court of Appeals is right. Let the judgment *nisi* be reversed and the cause remanded with directions to the circuit court to enter up a judgment for plaintiff herein annulling the decree of divorce in *Esther Robertson v. Orrin Robertson*, as prayed for in plaintiff's bill. It is so ordered. All concur; *Bond, P. J.*, in result.

THE STATE ex rel. JOHN T. BARKER, Attorney-General, v. JAMES P. SCOTT, Appellant.

Division C is, February 20, 1917.

1. **MONEY HAD AND RECEIVED: Payment: Judgment on Pleadings.** In a suit by the State against a county clerk to recover back money paid, an allegation charging that he had wrongfully and falsely certified to the State Auditor that he had extended the taxes upon the assessor's book, and by said false certificate had received a definite sum of money from the State for work he had not at the time performed, is covered by a general denial, and a judgment on the pleadings cannot stand, unless the other plea in the answer that the money was voluntarily paid, with full knowledge of the facts, before any of the work had been done, and that the work was afterwards done by him during his same term of office, constitutes no defense.
2. ———: ———: **By Public Officers: Mistake of Law.** Where all the participants were officers each acting solely in his official capacity, the rule that money paid under a mistaken view of the law, with full knowledge of the facts, cannot be recovered, has no application. In such case the officer receiving the money must find his right thereto in the law; and no subsequent approval, acquiescence or settlement, non-judicial in character, can operate to justify an unlawful act.
3. ———: ———: **Before Work is Done: Work Done Before Suit: Purpose of Extension on Assessment Book.** The statute (Sec. 11549, R. S. 1909) which allows compensation to the county clerk for "services rendered" in "extending the taxes on the assessment book" does not designate the time within which the work is to be done, nor fix a penalty for failure to do it before making out and delivering the tax book to the collector, and the act is such that the time of its performance has no effect upon the validity of the tax, and is important only (1) as an aid to the clerk in correctly extending the taxes upon the tax book and (2) as a permanent public record of the amount of the tax in accordance with the final orders of the county and state boards; and in an action by the State to recover back money from the county clerk, paid by the State Auditor before the work of extending the taxes on the assessment book was done, but which was done before the action was instituted, there can be no recovery on the theory either (1) of enforcing a penalty for not doing the work sooner or (2) that the payment having been made the duty to do it ceased and its performance thereafter was a work of supererogation.

Appeal from Clark Circuit Court.—*Hon. N. M. Pettin-*
gill, Judge.

REVERSED AND REMANDED.

Cooley & Murrell, J. A. Whiteside and B. L. Gridley for appellant.

(1) The statutory provisions pleaded and relied on by plaintiff make no provision as to when the work for which these fees were paid shall be completed, nor does any other statute; and even if there was a statutory time limit, and the work had not been completed within such time, neither the statute pleaded, nor any other, fixes as a penalty for such failure the forfeiture of the fees, nor authorizes the State to recover the fees after they have been paid; especially when, as here, the work was done and completed before suit brought. The burden is on the State to show a clear right of recovery. (2) The extension of the taxes for which these fees were paid to the clerk is not necessary to the validity of the assessment nor a prerequisite to the collection thereof. *State ex rel. v. Wilson*, 216 Mo. 286; *State ex rel. v. Lounsberry*, 125 Mo. 163. (3) The statute pleaded, Sec. 11397, R. S. 1909, provides that the clerk shall do this work. Sec. 11549 provides that he shall be paid certain fees for doing it. Neither section says when he shall do it. No statute provides that for any delay in doing it he shall forfeit the fees. If not done until after the "tax book" (the book that goes to the collector) has been made and delivered, it still remains the clerk's duty to extend these taxes on the assessor's book, which remains in his office. When done, he would unquestionably be entitled to the fees. Therefore, even if the State would have had a right to recover on the theory that the fees had not been earned when they were paid, if suit had been brought before the work had been done, it could have no such right to recover in this case, because when suit was filed, the work was done and the fees earned. (4) Money or fees paid through mistake of law cannot be recovered. The answer pleads, and for the purposes of this case, the motion for judgment admits, that the State paid the money with full knowledge of the facts. Hence if

there was a mistake, it was one of law. The law allows the clerk certain fees, aggregating a certain amount. Having received and charged himself with these fees it reduced the amount he could keep from other sources. It was a settlement. *State ex rel. v. Ewing*, 116 Mo. 129; *Corbin v. County*, 171 Mo. 385; *Schell City v. Mfg. Co.*, 39 Mo. App. 264; *State ex rel. v. Hawkins*, 169 Mo. 615; *State ex rel. v. Shipman*, 125 Mo. 436; *Scott County v. Leftwitch*, 145 Mo. 34. The case of *Lamar Twp. v. City of Lamar*, 261 Mo. 171, does not fit the case at bar; besides it recognizes that where there has been a settlement, or what amounts to a settlement, with an officer, the municipality is barred from any recovery. See *Lamar case*, l. c. 190, and cases cited.

John T. Barker, Attorney-General, and *Lee B. Ewing*, Assistant Attorney-General, for the State.

(1) The statutes require a county clerk to extend the tax levy for a given year, upon the assessment books, and after the extension has been made thereon to make a copy of said book with taxes extended for the use of the county collector. They require this to be done within ninety days, after the assessments have been equalized by the boards of equalization, and the assessments adjusted by the county clerk. This extension must be made at least before October 1st each year, and if it is not done before that time the clerk is entitled to no fee therefor. Secs. 11397, 11425, 11411, 11414, 11402, 11404, 11549, 11461, R. S. 1909. (2) The fact that suit was not brought to recover back these illegal fees until after the extension of the taxes had been made in August, 1914, does not avail appellant. A public servant may not collect money for the performance of a public service, fail to perform it until such a time as it has become useless, and then escape repayment by performing the useless service after demand for the repayment. (3) The doctrine that money paid under mistake of law cannot be recovered back has no application to public funds paid by one officer to another. To so hold would violate fundamental principles of law

and open wide the door to fraud in the dealing of officials with such funds. *Lamar Twp. v. Lamar*, 261 Mo. 183; *Morrow v. Surber*, 97 Mo. 155; *Ada County v. Gess*, 4 Idaho, 611; *Allegheny County v. Grier*, 179 Pa. St. 639; *Heath v. Allbrook*, 123 Iowa, 559; *Ellis v. State Auditors*, 107 Mich. 528; *State v. Young*, 134 Iowa, 505; *Board of Commissioners v. Heuston*, 144 Ind. 588; *Reppy v. Jefferson County*, 47 Mo. 66; *Sears v. Stone County*, 105 Mo. 236.

BROWN, C.—The petition, filed September 19, 1914, is in three counts, the first of which, omitting caption, is as follows:

“Comes now the plaintiff in the above entitled cause and states that on the——day of January, 1911, defendant was the duly appointed and commissioned clerk of the county court of Clark County, Missouri, and as such entered upon the discharge of his duties on the——day of January, 1911.

“Plaintiff states that in the year 1910 the county assessor of said Clark County duly assessed the real and personal property of said county, under and by virtue of article 2, chapter 17, Revised Statutes of Missouri 1909, and duly entered said assessment in the assessment book in said county and duly returned said assessment book to the county court of said county; and that the same was received and accepted by said court, and afterwards at the time provided by law, the State Board of Equalization of the State of Missouri and the County Board of Equalization of said Clark County duly passed upon and equalized said assessment. That afterwards, and at the time provided by law, there was duly levied upon said assessment, equalized as aforesaid, the state, county and municipal taxes of said Clark County, under and by virtue of article 5 of chapter 117, Revised Statutes 1909.

“Plaintiff further states that as such clerk and under and by virtue of section 11397, Revised Statutes 1909, it became and was the duty of the defendant to extend the taxes so levied as aforesaid upon said assess-

ment book; that under and by virtue of section 11549, Revised Statutes 1909, said defendant was entitled to receive as full compensation for extending the taxes upon said assessment-book, the sum of three cents for each name appearing thereon, the same to be paid by the said Clark County and State of Missouri in proportion to the number of tax columns used by each in said assessment book.

“Plaintiff further states that on the — day of — 191—, the defendant herein knowingly, wrongfully and falsely certified to the State Auditor of the State of Missouri that he had extended the taxes so levied as aforesaid upon said assessment book, and that he was entitled to receive therefor the sum of eighty-one dollars and fifty cents from the State of Missouri, as compensation for the proportionate part of said work of extending said assessment on behalf of the State of Missouri; that in reliance upon said certificate, and believing the same to be true, the State Auditor of the State of Missouri caused to be issued a warrant upon the State Treasurer of the State of Missouri for the sum of eighty-one dollars and fifty cents in favor of the defendant and delivered the same to him in payment of his alleged services in extending the taxes as aforesaid upon said assessment book, and that said warrant was duly paid by the State Treasurer, and that defendant received the money thereon.

“Plaintiff further alleges and charges that defendant did not extend the taxes so levied as aforesaid upon the assessment book aforesaid and so certified by defendant as aforesaid, and that by reason thereof defendant was not entitled to receive any compensation from the State of Missouri for any alleged service in extending said taxes.

“Plaintiff further states that although often demanded of defendant by plaintiff, said defendant has wholly failed and refused to return to said plaintiff the said sum of eighty-one dollars and fifty cents, paid him as aforesaid.

"Wherefore, plaintiff prays judgment against defendant for the sum of eighty-one dollars and fifty cents, with interest from — day of —, 1911."

The second and third counts declare for similar fees collected upon the assessments for the two following years respectively. The answer is, omitting caption and signatures, as follows:

"Defendant for answer to plaintiff's petition and each count thereof admits that he was during the times mentioned in each count of plaintiff's petition the duly elected and acting Clerk of the County Court of Clark County, Missouri. He admits that in the years mentioned in the petition the county assessor of said county assessed the real and personal property of said county and entered said assessment in the assessment books and returned said assessment books to the county court of said county, which were received and accepted by said court.

"Admits that the State Board of Equalization and the County Board of Equalization passed upon and equalized said assessments. That there were thereafter levied upon said assessments the state, county and municipal taxes of said Clark County.

"Admits that as such county clerk it became defendant's duty to extend the taxes so levied upon said assessment books, and that defendant under the statutes of the State of Missouri, was entitled to receive as compensation for so extending said taxes the sum of three cents for each name appearing thereon, to be paid by said Clark County and by the State of Missouri in proportion to the number of tax columns used by each in said assessment books.

"Defendant further answering says that the said moneys alleged in plaintiff's petition and each count thereof as having been paid by the State of Missouri for extending said taxes was paid by the State, and was the amount the State of Missouri should pay as provided by statute; that defendant received said money as part of his compensation as county clerk aforesaid.

"And defendant further says that during his said term of office, and before the filing of this suit, and to-wit, during the year 1914 and on and prior to the — day of August, 1914, he fully performed and completed the said work of extending said taxes for all of said years on said assessment books as was his duty to do as said clerk, as charged in plaintiff's petition, and that plaintiff is not entitled to recover said moneys or any part thereof.

"And defendant denies all other allegations in plaintiff's petition and each count thereof contained.

"And defendant further answering says that said moneys so paid by the State of Missouri were paid by it with full knowledge on the part of the State, through its agents, of all the facts and that plaintiff is not entitled to recover same and having fully answered defendant asks to be discharged with his costs."

To this a motion for judgment was filed, the body of which is as follows:

"Comes now plaintiff in this cause and moves the court to render judgment in favor of the plaintiff upon the mentioned facts and upon all the facts disclosed by the pleadings herein, for the reason that it fully appears from the face of the petition and answer in this cause that plaintiff is entitled to judgment upon each count of the petition for the amount in each count prayed.

"Wherefore plaintiff prays the judgment of this court."

The motion was sustained, to which exception was duly taken and judgment entered for the several amounts demanded, from which this appeal is taken. The only question is whether the plaintiff was entitled to his judgment on the pleadings.

I. The allegation of the petition that the defendant, to procure the payment of these fees, certified that the work had been done, is fully covered by the general denial in the answer. The case therefore stands upon the sufficiency of the plea that the money asked for in each of the three counts of the petition was

Payment.

voluntarily paid by the proper officers of the State, with full knowledge of the facts, before any of the work had been done, and that the work was afterward done by defendant during his same term of office, and before the institution of this suit. The question is whether, having been so paid, the money can now be recovered back by the State.

II. It is suggested by defendant that if the money was honestly paid, and received with a full knowledge on the part of the officers of the State of all the circumstances, it was paid under mistake of law, and cannot, therefore, be recovered back. We do not think **Payment:** this rule is applicable to this transaction. All **Mistake** the participants were officers, each acting solely **of Law.** ly in his official capacity. When one assumes to represent the State in the disposition of the people's money, he and those dealing with him must look to the law for his authority; and no subsequent act of approval, acquiescence or settlement non-judicial in character, can operate to extend that authority over an unlawful act. This question was lately considered by Division Number Two of this court in *Lamar Township v. City of Lamar*, 261 Mo. 171, in which the same conclusion was reached, and many authorities cited in its support. It remains for us to examine this case in the light of that doctrine as well as of other principles arising out of its peculiar facts.

III. That this action would lie to recover back the amount paid the defendant for extending the tax on the assessment book had the work not been done, we have no doubt; for section 11549, Revised Statutes 1909, under which it is claimed, allows the compensation for "services rendered" in "extending the tax on the assessment book," and these services are not rendered until the work is done. We will not, however, consider questions which might have arisen had the suit been instituted immediately upon the wrongful receipt of the money by the clerk, for they are not presented. When the suit was begun

the money had been paid, and the work done, so that the recovery sought is either the enforcement of a penalty against the clerk for not having done it sooner, or an assertion by the State that the duty to do it had ceased so that its accomplishment was a work of supererogation on his part. The first of these theories is untenable because a penalty can only be imposed by the Legislature, and we are cited to no statute, and have been able to find none, imposing it. The other theory is the one on which the Attorney-General evidently stands. In considering the question from that standpoint it occurs to us that there must have been not only a time when the duty of the clerk to extend these taxes upon the assessment book was fixed, but also a time when the duty ceased, and his failure became a delinquency; for it is evident that so long as the duty existed he might with propriety discharge it.

This court held, so long ago that any dissatisfaction with its ruling should have found expression in the statutes, that the omission of the clerk to extend the tax upon the assessor's books, as in this case, did not invalidate the tax or preclude its collection. [State ex rel. v. Lounsberry, 125 Mo. 157, l. c. 163.] As said in that case, the assessment constitutes the basis and foundation of the subsequent tax proceeding, and it might well have been added, had it been pertinent, that the tax book which it is made the duty of the clerk to prepare and deliver to the collector is the process provided by law for its collection. For this reason, no doubt, a penalty of twenty per cent of the amount of his fees for making it out is imposed by section 11425 upon the county clerk for failure to deliver it to the collector *within ninety days after the assessor's book shall be "corrected and adjusted."* The meaning of the three words we have quoted is interesting in connection with this question. Going back to section 11392, and taking up the history of the book to which they refer, we find that the assessor is required to return it to the county court properly verified on or before January 20th, subject to a penalty of twenty per cent of the amount of his fees for making

it, if he fails to return it on or before that date. The county clerk is then allowed one month to prepare from it his abstract for the State Board of Equalization, which he must return on or before February 20th or forfeit fifty per cent of the fees allowed him by law for preparing it. When the County Board of Equalization and Appeals and the State Board of Equalization have respectively acted with reference to the values it contains, the labor of the clerk upon the book again begins. He must then so correct the book that the valuation of each item of property assessed shall appear upon it in two separate additional columns as corrected by each of those bodies. It is then and only then that the assessment book is ready for the computation and extension upon its pages of the amounts of each of the several taxes levied against the property of the county. It is then also that the book is ready to be copied in the tax book and the taxes extended thereon for the collector as provided by section 11425 to which we have already referred. He then has only ninety days for the performance of this work until the penalty of twenty per cent accrues for delay, while no penalty is imposed upon him for failure to extend the taxes upon the assessment books, with the multitude of computations it involves. It is not surprising that, confronted by this condition, he should examine closely section 11425 to determine whether it directs him as to priority in computing and extending the taxes on these two books. That part of the section which interests him is as follows: "As soon as the assessor's book shall be corrected and adjusted, the clerk of the county court, . . . shall within ninety days thereafter, make a fair copy thereof, with the taxes extended therein, authenticated by the seal of the court, for the use of the collector." There is nothing in either of the words "corrected" or "adjusted" that implies even remotely the extension of a tax on the book. The assessment has been corrected by each of the boards of equalization, and is to be adjusted by bringing the adjusted valuations into proper relations with each other, so that the combined result, as to each item of taxable

property entered upon its pages, shall appear, expressed in its appropriate columns. It is then that the clerk is required to make a fair copy thereof with the taxes extended therein. There is nothing in this expression which indicates that the word "therein" refers to the original book rather than to the copy.

The assessor's book constitutes a permanent record to be kept in the office of the county clerk from the time of its return by the county assessor with his own valuation written in a single column. As such record, it grows under the hand of the clerk in the performance of his duties. First, the work of the county board of equalization is entered upon its pages; it is then adjusted to the work of the State Board of Equalization; and then the taxes upon each item of property is entered upon it. The Legislature, had it considered it important, could have stated in unmistakable terms that it should be prepared and the taxes extended thereon before they should be extended upon the tax book for the use of the collector. While it imposes other penalties for delay, it imposes no penalty of any kind with respect to delay in this particular work, but leaves it to his own sense of duty and desire to earn and receive the fees. Had it specified the time when the work should be completed, that feature would have been merely directory, unless the nature of the act or the phraseology of the statute had been such that the designation of time must be considered as a limitation of power. [Lewis-Sutherland Statutory Construction (2 Ed.), sec. 612, p. 1117.] In this case the nature of the act was such that the time of its performance or its performance at all had no effect upon the validity of the ultimate thing to be accomplished, and was only important as an aid to the clerk in correctly extending the taxes upon the tax book, and as a permanent record of the process by which this was done.

As we have already shown the Legislature has been liberal in the imposition of penalties to secure the prompt performance of those acts which constitute a part of the assessment, levy and process for the collection of

In re Drainage Dist.; Buschling v. Ackley.

taxes where time was considered important, and has added (Sec. 11544) to the list of these a fine of not less than \$10 nor more than \$1000 against any officer who shall knowingly violate any of the provisions of the chapter we are considering, and also a fine of not less than \$10 nor more than \$500 for refusal or neglect to perform any of the duties required of him by said chapter upon being required so to do by any person interested in the matter. Should it think it important to specify either the time or order in which the taxes shall be extended upon the assessor's book, or to impose specific penalties for lack of diligence in that respect, we are sure the performance of such duty will not be neglected.

Under the present state of the law the judgment upon the pleadings in their present condition must be reversed and the cause remanded. *Railey, C.*, concurs.

PER CURIAM:—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All the judges concur.

In Re MISSISSIPPI & FOX RIVER DRAINAGE DISTRICT; JOHN BUSCHLING et al., Petitioners, v. JOHN ACKLEY et al., Objectors, Appellants.

In Banc, February 24, 1917.

1. **DRAINAGE DISTRICT: Municipal Corporation.** A drainage district is a municipal corporation, and must be provisionally incorporated as such before any step can be taken looking to the drainage of land embraced therein.
2. ———: **Appeal.** The right of appeal from a decree incorporating any municipal corporation is limited.
3. ———: **Property Rights Affected by Incorporation.** That a person or his property has been included in a drainage district in no manner affects his rights, provided his property has not been benefited or damaged.

In re Drainage Dist.; Buschling v. Ackley.

4. ———: **Right to Appeal: For What Things Authorized.** Notwithstanding the statute (Laws 1913, sec. 116, p. 241) says that "any person may appeal from the judgment of the court" in a drainage district case, the subsequent words of the statute limit the inquiry of the appellate court (1) to the compensation allowed for property taken and (2) to the damages allowed for property prejudicially affected by the improvement. It is the taking or damaging of property, and not the incorporation of the district, that affects the owner's rights and authorizes his appeal.
5. ———: ———: **Incorporation.** Objectors are not entitled to an appeal from the judgment of the circuit court incorporating a drainage district, if the court has jurisdiction of the subject-matter.
6. ———: ———: ———: **Raised in Suit on Tax Bill.** Whether a drainage district has been legally incorporated or not can be raised in a suit on the tax bills.
7. ———: ———: **Incorporated for Unauthorized Purpose.** There is a wide difference between a drainage district and a levee district; and while the question of whether a district organized as a drainage district was in fact a levee district may be properly raised on an appeal from a decree incorporating it, since lack of jurisdiction of the subject-matter may be shown in any suit involving it, yet the better practice is to raise the question of legality of incorporation in the suit on the tax bills. [Distinguishing Birmingham Drainage District v. Milwaukee Ry. Co., 266 Mo. 60, and Elsberry Drainage District v. Harris, 267 Mo. 139.]
8. ———: ———: **General Statute Inapplicable.** The general statute governing appeals does not apply to a drainage district case. The proceeding in such case is purely statutory, and there can be no appeal unless the drainage act, which is a complete code unto itself, authorizes it.
9. ———: ———: **Why Appeal from Judgment of Incorporation is Not Allowed.** The decree incorporating a drainage district is preliminary, informal, tentative and conditional and not a final decree adjudicating any one's rights from which an appeal will lie.

Appeal from Clark Circuit Court.—*Hon. N. M. Pettin-gill*, Judge.

APPEAL DISMISSED.

E. R. McKee and *Boyd & McKinley* for appellants.

(1) Respondents' motion to dismiss this appeal should be overruled, as an appeal from a decree incor-

porating a drainage district is authorized and has been recognized as a proper procedure for the purpose of having the action of the circuit court incorporating a drainage district reviewed. (a) The circuit court is given original and exclusive jurisdiction of the incorporation of a drainage district such as that sought to be incorporated by respondents. Laws 1913, sec. 3, pp. 234, 235; Sec. 3956, R. S. 1909. Any party to a civil suit has a right to appeal in every cause, unless there is a constitutional prohibition against the appeal. Sec. 2038, R. S. 1909. Sec. 36, Laws 1913, p. 253, appears to indicate that there is no limitation or restriction upon the right to take an appeal from any action of the circuit court had under the act. Sec. 1927, R. S. 1909, authorizes a change of venue in a civil suit and in *State ex rel. v. Riley*, 203 Mo. 175, 12 L. R. A. (N. S.) 900, it was expressly decided that a drainage proceeding was a civil suit within the meaning of the above statute. (b) Statutes pertaining to appellate procedure are entitled to a liberal construction. *Stid v. Railroad*, 211 Mo. 411. A final judgment is one where the court's jurisdiction over the matter in question before the court is exhausted. *State ex rel. v. Bland*, 189 Mo. 216. The right of appeal not being prohibited by the Constitution or by the drainage act appellants may appeal under the general provision that there is an appeal from any decision of the circuit court with reference to a civil suit. Sec. 2038, R. S. 1909; Sec. 36, Laws 1913, p. 253; *Weston v. Charleston*, 2 Peters, 449; *Hockemeyer v. Thomason*, 150 Ind. 176; *Crune v. Wilson*, 104 Ind. 543; *Kings Lake Drainage District v. Jamison*, 176 Mo. 564; *Drainage District v. Voltmer*, 256 Mo. 152; *Birmingham Drainage District v. Chicago, M. & St. P. Ry. Co.* 178 S. W. 893; *Squaw Creek Drainage District v. Turney*, 235 Mo. 80; *Elsberry District v. Harris*, 184 S. W. 89. (c) The Circuit Court Drainage Act of March 24, 1913, is not a special statute, but is a part of general legislation on the question of drainage and has connection with other similar statutes and can trace its origin to an act in 1879. It was passed with a view to the harmonious develop-

ment of the law on this question and to making it a part of the general laws of the State. *Birmingham District v. Railroad*, 178 S. W. 895; *State v. Taylor*, 224 Mo. 393. The decree of incorporation of a drainage district is a final determination by the court on that question. *Big Lake District v. Rolwing*, 178 S. W. 112.

Charles Hiller, John M. Dawson and T. L. Montgomery for respondents.

The decree incorporating the district is a purely experimental proceeding, for the purpose of ascertaining if a drainage district can be formed under the supervision of the court to be thereafter determined in its order. It is not a final decree or judgment from which an appeal lies. The drainage laws, a special code of procedure, make no provision for this appeal. The motion to dismiss should be sustained. (a) The drainage act is a code unto itself, every step is specifically pointed out and the procedure designated, and the act is to be liberally construed in carrying out this legislative intent and purpose. Secs. 4, 16, 37 and 62, Laws 1913, p. 232; *State ex rel. v. Bates*, 235 Mo. 293; *State ex rel. v. Bugg*, 224 Mo. 554. (b) It was not the legislative intent to allow an appeal at this stage in the procedure. There are no inherent rights of individuals involved in remedial procedure and no constitutional provision, either State or Federal, is violated in denying an appeal. *State ex rel. v. Taylor*, 224 Mo. 393; *St. Louis v. Calhoun*, 222 Mo. 44; *Clark v. Kansas City Railway Co.*, 219 Mo. 524. (c) There is no obligation imposed by bringing the individual into the district; if his property is not benefited under the law his rights are in no way affected under the Drainage Act. *Land & Live Stock Co. v. Miller*, 170 Mo. 256; *Drainage District v. Railroad*, 236 Mo. 107; *Page & Jones on Taxation by Assessment*, sec. 743; *Spencer v. Merchant*, 125 U. S. 345; *Morrison v. Morey*, 146 Mo. 563; *Hager v. Reclamation District*, 111 U. S. 701; *Irrigation District v. Bradley*, 164 U. S. 112; *C. B. & Q. Ry. Co. v. Drainage Commrs.*, 200 U. S. 56; *State ex rel. v. County Commrs.*, 87

Minn. 336; Irrigation District v. Williams, 76 Cal. 367. (d) The drainage act being purely a statutory proceeding both as to the tribunal and the character of the proceedings was unknown to the common law and is special and constitutional and the provisions of the code of civil procedure are not applicable thereto. State ex rel v. Spencer, 166 Mo. 285; State ex rel. v. Hough, 193 Mo. 615; Terminal Ry. & B. Co. v. Atchison, 137 Mo. 218; Rothman v. Railroad, 113 Mo. 143; Drainage District v. Campbell, 154 Mo. 151; Anderson v. Pemberton, 89 Mo. 64; Railroad v. Townsite Co., 103 Mo. 457; State ex rel. v. Slover, 134 Mo. 15. (e) The district is not a corporation within the meaning of the Constitution, cannot demand a jury, and the issues are to be tried by the court in a summary manner without delay. Kansas City v. Vineyard, 128 Mo. 78; Sec. 4, Laws 1913, p. 235; Drainage District v. Tourney, 235 Mo. 80, l. c. 95; State ex rel. v. Eicher, 178 S. W. 173. (f) The only appeal authorized by the act is found in Section 16, p. 241, Laws 1913, and what questions alone to be determined are set forth. The right of appeal is by the act limited. The Legislature has a right to so limit it or to dispense with any appeal at any stage of the proceedings, leaving any judgment rendered liable to be attacked either directly for fraud or collaterally on the ground that it is void on its face. Drainage Dist. v. Railroad, 216 Mo. 715. This appeal does not come within the only statute which can authorize it and the motion to dismiss should be sustained. Sec. 16, Laws 1913, p. 241; Tie Co. v. Drainage District, 226 Mo. 441; Sutherland on Statutory Construction, sec. 234, p. 309.

WALKER, J.—This is an appeal from a judgment of the circuit court of Clark County incorporating the Mississippi & Fox River Drainage District in said county.

The controversy arose out of a misunderstanding between the landowners and petitioners asking for the incorporation; some contended that they signed the pe-

tion under a misapprehension of the facts, others changed their minds and desired to withdraw their names from the petition and that they be included in an adjoining district, and so informed the court; the remainder were content with the proposed district. All of these facts (the details of which are immaterial) finally led to an order of the court dismissing the cause as to certain objectors, and thereupon the remaining petitioners filed an amended petition asking for the incorporation of the district now in controversy.

The district as described in the amended petition did not meet with the concurrence of all the landowners included, and excluded therefrom, and consequently a new attack was made thereon by certain property owners named therein.

All of their objections were by the court overruled, and a decree was entered incorporating the last proposed district; from that action the objecting landowners appealed to this court.

Upon the cause reaching this court counsel for respondents filed a motion to dismiss the appeal for the reasons:

First: "That the decree appealed from is not a final decree, judgment or order of the circuit court of Clark County, Missouri."

Second: "That the decree appealed from is not a decree, judgment or order on which an appeal will lie to this court."

Third: "That no appeal is authorized by law in this cause to this court."

While there are some minor questions presented by the record, they are more of a personal than a legal character; the major proposition involved herein is one of law pure and simple, and that is, does an appeal, under the statutes of this State, lie from a decree of the circuit court incorporating a drainage district?

Counsel for appellants assert the affirmative, counsel for respondent the negative. Counsel for respondents rely upon section 16, page 241, Laws 1913, in support of their contention. It should be borne in mind that a

drainage district is, by express statute, a municipal corporation and must be provisionally incorporated as such before any step can be taken looking to the drainage of the land embraced therein. The section mentioned reads as follows:

“Sec. 16. The drainage district or any owner of land or other property in said district, may file exceptions to said report or to any assessment for either benefits or damages, within ten days after the last day of publication of the notice provided for in the preceding section. All exceptions shall be heard by the court and determined in a summary manner so as to carry out liberally the purposes and needs of the district, and if it appears to the satisfaction of the court, after having heard and determined all of said exceptions, that the estimated cost of constructing the improvement contemplated in the ‘plan for reclamation’ is less than the benefits assessed against the land and other property in said district, then the court shall approve and confirm said commissioners’ report as so modified and amended. The court shall adjudge and apportion the costs incurred by the exceptions filed and shall condemn any land or other property, within or without the boundary lines of the district, that is shown by the report of the commissioners to be needed for rights of way, holding basins and other works, or that may be needed for material to be used in constructing said works, following, as nearly as possible, the procedure that is now provided for by law for the appropriation of land and other property taken for telegraph, telephone and railroad rights of way. The clerk of said circuit court shall transmit a certified copy of the court decree and copy of the commissioners’ report, as confirmed or amended by the court, to the secretary of the board of supervisors of the district, who shall make and transmit a certified copy of the said decree and that part of the said report affecting land in each county to the recorder of each county having lands in the district, or affected by the said report, where the same shall become a permanent record and each such recorder shall receive a fee of

one dollar for receiving, filing and preserving the same. *Any person may appeal from the judgment of the court, and upon such appeal there may be determined either or both of the following questions: First, whether just compensation has been allowed for property appropriated; and, second, whether proper damages have been allowed for property prejudicially affected by the improvements.*" [The italics are our.]

The peculiar wording of the first clause of the italicized portion of the statute should be noted, viz: "Any person may appeal from the judgment of the court." This language is general in its terms, and if it were not limited by what follows, an appeal would bring up all questions involved in the case; but the remainder of the section limits the authority of this court to determine either or both of the questions above italicized.

This is no other statutory provision for an appeal in drainage cases organized under the circuit court article. This is not unusual, because in most if not in all cases arising out of municipal legislation the right of appeal is more or less limited; especially is this true regarding an appeal from an act or decree incorporating a municipal corporation. In fact, it would be unusual and strange if an appeal from such a decree should be authorized. If it be true that an appeal lies from a decree incorporating a drainage district, or any other municipal corporation, then the question would naturally arise, who should or may take it, and when? This and other courts of this country have repeatedly held that the mere fact that a person or his property has been included in a drainage district, in no manner affects his rights, provided his property has not been benefited or damaged. [Mound City Land & Stock Co. v. Miller, 170 Mo. 240, 1. c. 256; Little River Drainage District v. Railroad, 236 Mo. 1. c. 107; Ross v. Board of Supervisors, 1 L. R. A. (N. S.) 1. c. 437; Spencer v. Merchant, 125 U. S. 345; Morrison v. Morey, 146 Mo. 1. c. 563; Hagar v. Reclamation District, 111 U. S. 701; Fallbrook Irrigation District v. Bradley, 164 U. S. 112; C. B. & Q. Ry. Co. v. Drainage Commrs., 200 U. S. 561; State ex

rel. v. Board of County Commrs., 87 Minn. l. c. 336; Irrigation District v. Williams, 76 Cal. l. c. 367.]

There is no pretense that the decree of incorporation affects appellants' property rights, directly or indirectly, but upon the contrary the Act of 1913, before mentioned, expressly provides that after the district has been incorporated, that is tentatively, and not before, a board of directors shall be elected, etc., and they shall appoint commissioners to assess benefits and damages that may be sustained by the property situate in said district on account of said improvements. [Secs. 5 to 14, Laws 1913, pp. 235-240.]

Sections 15 and 16 of the same act provide for notice to the property owners of said assessments, and authorize them to file exceptions thereto to be heard by the court in a summary manner, etc., and to render judgment modifying, confirming or rejecting the report of the commissioners assessing benefits and damages as the evidence may warrant, and from that judgment an appeal may be taken, but the authority of this court is limited, as before shown, first, to an inquiry as to compensation allowed for property taken, and, second, as to the damages allowed for property prejudicially affected by the improvements.

From this it is evident that it is the taking or damaging of the property, and not the incorporation of the district, that affects the owner's rights and gives him the right to an appeal. This identical question came before this court in the case of Drainage District No. 4 v. Railroad, 216 Mo. 709. Judge VALLIANT (p. 715). speaking for the court, said:

"A right of appeal is one given by statute and in order that a party may avail himself of the right conferred he must conform to the requirements of the enabling statute. The General Assembly might, if it had seen fit to do so, have made the judgment of the county court in such case final and allowed no appeal, in which event the judgment could be attacked only either directly for fraud, or collaterally on the ground that it was void on its face. In this kind of proceeding the statute gives

an appeal, but it prescribes the method to be pursued in taking the appeal and limits the questions that may be litigated in the appellate court. The General Assembly has been careful to express the limitations on this right, and also on the scope of the litigation after the appeal is taken, saying who may appeal, when and how the appeal may be taken, and what questions may be heard by the circuit court when the cause reaches that court. When we notice the changes or amendments that have been made in the statutes on these points we see that the General Assembly has acted with deliberation.

“Section 8292, as it appears in Revised Statutes 1899, says: ‘Any person or corporation party to proceedings may, . . . file exceptions to the apportionment, or to any claim for compensation or damages at any time before the day set for the hearing of said report by the court.’ It then provides that the court may hear the evidence and pass judgment on the exceptions. Then it says: ‘Any person or corporation may appeal from the order of the court, and upon such appeal may determine either of the following questions: First, whether such improvement will be conducive to public health, convenience or welfare, or the location of any part changed; second, whether the route is practicable; third, whether compensation has been allowed for property appropriated; fourth, whether proper damages have been allowed for property affected by the improvements. The appellant shall pray an appeal and file a motion, in writing, specifying therein the matters appealed from, which motion shall be filed and recorded.’ We will note that it is there specified who may file exceptions, to what the exceptions may relate, who may appeal from the order sustaining or overruling the exceptions, how the appeal may be taken and what questions may be heard on the appeal. In 1903 that section was amended so as to reduce the questions that might be litigated on appeal from four to two: ‘First, whether compensation has been allowed for property appropriated; second, whether proper damages have been allowed for property affected by the improvements.’ The amendment also

provided that the appeal should not stay the proceedings in the county court or delay the work, but the proceeding subsequent to taking the appeal should affect only 'the rights and interests of the property located in such drainage district owned by appellant or appellants.' [Laws 1903, p. 235.]

"In 1905 the section was again amended, so that instead of the persons or corporations who might file exceptions and who might appeal from the ruling of the court thereon as specified in the original section and repeated in the amendment of 1903, it was said: 'Any person whose lands are affected by the proposed improvement' may file exceptions, etc., and appeal from the ruling of the county court thereon. The Act of 1905 corrects also the awkward wording of the last sentence of the amendment of 1903, so as to read: 'And any subsequent proceedings in the circuit court shall affect only the rights and interest of the appellant in property located in such drainage district.' [Laws 1905, p. 185.] This section 8292, Revised Statutes 1899, rewritten so as to embody the amendments above noted, appears as section 8292 in Mo. Ann. Stats., vol. 4, pages 3922-3, and as it there appears is now the law.

"Thus we see that the General Assembly has with great particularity limited the subjects to which the exceptions may relate, has limited the right of appeal to the ruling of the court on those exceptions and limited the questions to be considered by the circuit court on the appeal."

The only difference between that case and this one is that the statutes there under consideration were the acts of 1903 and 1905 and contained in the article applicable to the incorporation of such districts in the county court, instead of the circuit court, as here, and the grounds of appeal there were four in number instead of two, as in the Act of 1913. By reading the various acts it will be seen that the Legislature, by the last, limited the grounds of appeal from four in the former acts to two in the latter. This shows that it was

the policy and purpose of the Legislature to limit the right of appeal in drainage cases.

The same question again came before this court in the case of the Western Tie & Timber Co. v. Naylor Drainage District, 226 Mo. 420. Judge BURGESS (p. 440), speaking for the court, said:

"The first question presented by this record for determination is, will an appeal lie from the judgment of the county court incorporating a drainage district under article 4 of chapter 122, Revised Statutes 1899, to the circuit court?

"This same question was presented to this court in the case of Drainage District v. Railroad, 216 Mo. 709. That was a proceeding instituted, under the same article, in the county court of Chariton County, for the purpose of organizing a similar district." After quoting with approval the limitations on the right of appeal in cases of this character as held in Drainage District v. Railroad, *supra*, Judge BURGESS says:

"After the Acts of 1903 and 1905, mentioned in said opinion, became operative, they became applicable to all subsequent proceedings had in the case at bar. [State ex rel. v. Taylor, 224 Mo. 393.]

"We are, therefore, of the opinion that appellant was entitled to an appeal from the order of the county court of Ripley County, organizing said drainage district, etc.; but by the express terms of said acts, the authority and jurisdiction of the circuit court was limited to the trial and determination of 'either one or both of the following questions:

"'First, whether compensation has been allowed for property appropriated; and, second, whether proper damages have been allowed for property prejudicially affected by the improvements.'"

These are the only cases that have dealt with the question of the right of appeal since the statutes upon that subject have been amended.

The main reliance of counsel for appellants is upon the case of King's Lake Drainage & Levee District v. Jamison, 176 Mo. 557. It does not support the conten-

tion of counsel. The statute there under consideration, Sec. 8331, R. S. 1899, expressly provided for an unlimited appeal, as follows:

“If the finding of the court be in favor of the validity of the proceedings, the court, after the report shall have been modified to conform to the findings, or, if there be no remonstrance, the court shall confirm the same, and the order of confirmation shall be final and conclusive, and the proposed work be established and authorized and the proposed assessments approved, subject to the right of appeal to the Supreme Court, as in other actions.”

The various amendments of the statute, after the decision in the King's Lake Drainage District case, *supra*, was rendered, limiting the right of appeal to specifically designated questions therein stated, is quite significant of the fact that the Legislature intended to and did take away the right of appeal from the decree incorporating the district, as well as from all other questions not specifically provided for in the act.

The next case relied upon by counsel for appellants is that of *In re Drainage District v. Voltmer*, 256 Mo. 152. While there is language in that opinion which lends color to counsel's contention, an examination shows that the appeal was taken from the judgment confirming the report of the commission assessing damages and benefits to property affected by the proposed improvements, and not from the decree incorporating the drainage district. In fact, the district had long before been incorporated by a decree of the circuit court of Andrew County, where the cause had been transferred on change of venue, and after having been certified back to the circuit court of Holt County, as provided by law, the proceedings complained of were had in the latter court, and had nothing to do with the incorporation of the district in the Andrew County Circuit Court. In fact, the question of the incorporation of the district was not mentioned except as above indicated. Therefore, that case lends appellants no assistance.

The next case cited by counsel for appellants is that of Birmingham Drainage District v. Chicago, Milwaukee & St. Paul Ry Co., 266 Mo. 60. The ruling therein is not in point. The real question there was whether or not the district was in fact incorporated for the purposes authorized by the Act of March 24, 1913, namely, to drain swamp and overflowed lands, or to construct an extensive levee system along the Missouri River in front of the proposed district, and only incidentally, if at all, drain the lands included therein. In other words, the contention was that the statute enacted for one purpose was applied for a wholly different purpose from that designated by the Legislature, and therefore the corporation was not in fact a drainage district, but a levee district, and therefore acquired no jurisdiction over the lands embraced therein.

That question could have been and was properly disposed of on appeal; but it also could have been raised in a suit on the tax-bills, for lack of jurisdiction may be shown in any suit involving that question; and the better practice would be to raise the question by answer in a suit on such bills. The question involved was not so much as to the validity of the decree of incorporation, as it was to the application of the act to accomplish a purpose foreign to the design of the Legislature. Under those facts, while the validity of the decree of incorporation was involved, it was only incidental to the larger questions, first, is there a difference, within the meaning of said act, between a drainage system and a levee system, and, second, if so, did the act authorize the construction of a levee system instead of a drainage system?

Attending the first: In a sense there is a wide difference between the two; a drainage system is designed primarily to drain or draw water from swampy and overflowed lands, and secondarily to prevent water from accumulating thereon by the overflow from streams, backwater, etc.; while a levee system, like a drainage system, may primarily be intended to prevent water from accumulating upon such lands by overflow and backwater, its purpose secondarily may be to collect

water upon such lands and hold the same for commercial or other purposes; most of the latter purposes are usually accomplished by the construction of a dam, but not always so, especially when the purpose is to store large bodies of water for irrigating purposes; in such cases a system of levees, or levees and ditches are resorted to.

It was in the latter sense that the defendant in the Birmingham Drainage District case insisted the district was being constructed, and not all for drainage purposes, within the meaning of the act. That clearly involved a jurisdictional question of the district over the land.

While this court discussed certain other questions presented in that case, they were minor ones and only incidental to the main question presented and decided, namely, that it was in fact a drainage district and not a levee district. Moreover, the question here presented was not made or discussed by court or counsel in that case. That case has but little relevancy to the question here under consideration, and that only in an incidental manner.

Elsberry Drainage District v. Harris, 267 Mo. 139, is similar to that of the Birmingham Drainage District case. The facts in that case were as follows: the plaintiff undertook to extend the boundaries of its district by adding the lands of the defendants. The evidence showed that the real purpose of the proposed extension was not to drain the objecting defendants' lands; that the plan would not necessarily effect this result; that the district, as originally constructed, only included lands south of a certain creek, and the extension was to include certain lands lying north thereof, a part of which belonged to the objectors, the appellants; that the lands to be actually drained were to be by a ditch to be constructed under said creek and extended to the district pumping plant; and that the real purpose of the entire scheme was to enable other individuals owning land north of said creek to drain their lands and to reap the profit to be realized from their reclamation at

the expense of the objectors. In other words, the objectors' lands were not included in said proposed extension for drainage purposes, but for the purpose of acquiring lands upon which to construct levees and drains to drain the lands of others, and that, too, at the expense of the objectors.

Clearly that was not the purpose of the Legislature in enacting the statute. Under that view of the case, the district had no legal authority or power to include the objectors' lands within its boundaries for taxable purposes. In other words, it acquired no jurisdiction over said lands; and this court in legal effect properly so held in the determination of that case. The incorporation of the district in that case was not questioned, as in the case at bar; only the right to tax objectors' lands was involved. So far as the incorporation was concerned it was held to be valid. While it is true the objectors could have made the same defense in a suit on the tax-bills, yet they were not compelled to do so, for the elementary reason that the lack of jurisdiction over the subject-matter may be shown at any time in any suit or proceeding involving that question, even in a collateral proceeding.

It was not the design of the Legislature in limiting the right of appeal in drainage cases to deny to one affected thereby the right to question the jurisdiction of the district over the subject-matter thereof; and if that were the intention then clearly the statute to that extent, at least, would have been unconstitutional. This is expressly provided for by section 20 of article 2 of the Constitution of 1875, as follows:

“That no private property can be taken for private use, with or without compensation, unless by the consent of the owner, except for private ways of necessity, and except for drains and ditches across the lands of others for agricultural and sanitary purposes, in such manner as may be prescribed by law; and that whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and as

such judicially determined, without regard to any legislative assertion that the use is public."

In the *Elsberry* as in the *Birmingham* case, the question here presented was not presented, discussed or decided except as previously stated. That case, therefore, is not applicable to the case at bar. The other two cases cited by counsel for appellants arose under acts antedating the act of 1913 and are therefore inapplicable.

Counsel for appellants also insist that under section 2038, Revised Statutes 1909, the general statute governing appeals applies in this case, and cite in support thereof *State ex rel. v. Riley*, 203 Mo. 175. Counsel misinterpret the ruling in that case. There we use this language: "We are of the opinion that in drainage cases the modes of procedure and the rules of practice prescribed by our civil code may be used to supply omissions in the drainage statutes"—clearly indicating that the general statutes could not displace statutes especially applicable to drainage cases.

The drainage act being purely a statutory proceeding, both as to the tribunal and the character of the proceedings, was unknown to the common law and the act is special and constitutional and the provisions of the code of civil procedure are not applicable thereto. In its present amended form it is a code unto itself. It is in all respects as to its provisions like the election law, forcible-entry-and-detainer law, road law and eminent-domain statutes, and should be strictly followed and so construed, independent of the civil code. This is especially true on appeal. [*State ex rel. Hancock v. Spencer*, 166 Mo. 1. c. 285; *State ex rel. Wells v. Hough*, 193 Mo. 615; *Leavenworth Terminal Ry. & B. Co. v. Atchison*, 137 Mo. 218; *Rothan v. Railway*, 113 Mo. 1. c. 143; *Nishnabotna Dr. Dist. v. Campbell*, 154 Mo. 151; *Anderson v. Pemberton*, 89 Mo. 64; *Railroad v. Randolph Townsite Co.*, 103 Mo. 1. c. 457; *State ex rel. Keshlear v. Slover*, 134 Mo. 1. c. 15.]

The drainage act is a separate and distinct statute. Since the various amendments thereto it is a complete code unto itself. Not being placed in the statute under

State ex inf. v. Koeln.

the civil code of procedure, it is independent of it and is not governed by it. Consequently the procedure thereunder is not as in an ordinary civil case within the meaning of the code of civil procedure and is not governed by it. Section 2038, Revised Statutes 1909, has, therefore, no application.

Section 4 of the act provides that the objections filed be limited to denial of the statements in the articles of association and be heard by the court in a summary manner without delay. Are they true or false? No other question can be raised. There is but little to try. A reason why no appeal is provided for in the act is evident from the fact that this proceeding to incorporate is preliminary, informal, tentative and conditional and not a final decree adjudicating any one's rights from which an appeal lies. The incorporation of the district simply organizes an entity with which to further proceed to effect reclamation to be hereafter accomplished, if possible, in orderly and well defined procedure. [Drainage District v. Railroad, 216 Mo. 709; Carder v. Fabius Riv. Dr. Dist. No. 3, 262 Mo. 542; Squaw Creek Dr. Dist. v. Turney, 235 Mo. l. c. 95; State ex rel. Roberts v. Eicher, 178 S. W. l. c. 173.]

From all of which it follows that the motion to dismiss the appeal should be sustained, and it is so ordered. All concur except *Williams, J.*, not sitting.

THE STATE ex inf. JOHN T. BARKER, Attorney-General, v. EDMOND KOELN.

In Banc, February 24, 1917.

1. **COLLECTOR OF ST. LOUIS:** Elected in April, 1913. No one could be or was legally elected to the office of Collector of the Revenue for the city of St. Louis at the April election held in 1913. Said office is a county office, and the statute (Sec. 11432, R. S. 1909; Laws 1905, p. 272) requires the Collector to be elected at the general election held in November, 1906, and every four years thereafter.

State ex inf. v. Koeln.

2. ———: **Charter Provisions: Special Laws.** It was not intended that the provision of the Constitution of 1875, which provided that the charter to be framed for the city of St. Louis "shall supersede all special laws relating to St. Louis County," should for all future time be the controlling law upon the subject-matter covered by said existing special laws; for the Constitution also says that such charter "shall always be in harmony with and subject to the Constitution and laws of this State," that the city shall "collect the State revenue and perform all other functions in relation to the State in the same manner as if it were a county," and that "the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties;" and although there was a "special law" applicable to the county of St. Louis providing for the election of a collector for said county when the Constitution of 1875 was adopted, and the charter as framed named the collector as a city officer and provided for his election, the General Assembly, under these constitutional provisions, had authority to enact a statute applicable to all counties, including the city of St. Louis, and to require the election of a collector of the revenue in each at the general election held in November, 1906, and every four years thereafter, as it did in 1905, Laws 1905, p. 272.

3. ———: **Elected for Unexpired Term: Entrance into Office.** The office of Collector of the Revenue begins in March, and the general statute provides that in case of a vacancy occurring in said office it shall be filled by appointment by the Governor and that such appointee shall hold office until March. The person elected at the preceding November election to fill an unexpired term does not take possession of the office immediately upon his election, nor until the next March, whether the Governor filled the vacancy by appointment prior or subsequent to such election.

4. ———: ———: ———: **Appointment After Election.** The fact that the Governor failed to appoint some one to fill the vacancy in the office of Collector of Revenue, which had existed for sometime, until after the election of respondent to fill the unexpired term, did not authorize respondent to assume the duties of the office. The statute does not declare when the appointive power shall be exercised, and he may therefore exercise it at any time before the expiration of the time the statute says his appointee shall occupy the office. Besides, respondent's title to the office comes through and by virtue of the rights incident to his election, and not through any default or delayed action of the Governor.

Quo warranto.

WRIT GRANTED.

Frank W. McAllister, Attorney-General, *John T. Gose* and *S. P. Howell*, Assistant Attorneys-General, for relator; *Benjamin H. Charles*, of counsel.

(1) The burden is on the respondent to establish his right to the office. *State ex rel. v. McCann*, 88 Mo. 386; *State ex rel. v. Powles*, 136 Mo. 376. (2) (a) The legal requirement that collectors should be elected in 1906, and every four years thereafter, is, substantially, a direction that no election for that office shall be held in any intervening year. *State ex rel. v. Roach*, 269 Mo. 500. The designation by the statute of the years in which collectors are to be elected was intended to prevent collectors being elected in presidential years. *State ex rel. v. Roach*, 269 Mo. 500. (b) The General Assembly had the power to prescribe the term of office of collector, and to fix the time of elections therefor. Constitution, art. 9, sec. 14; *State ex inf. v. Herring*, 208 Mo. 727. The term is those four years ending on the first Monday in March of the year in which the collector is required to make his last final settlement for the tax book to be collected by him. R. S. 1909, sec. 11448; *State ex inf. v. Herring*, 208 Mo. 728. The vacancy admitted by respondent extended to the end of the four years which began in March, 1915. *State ex inf. v. Herring*, 208 Mo. 726. The Governor had the constitutional right to fill that vacancy. Constitution, art. 5, sec. 11; *State ex inf. v. Herring*, 208 Mo. 726. (c) In the exercise of its legislative discretion the General Assembly has fixed a regular time for the holding of an election for the office of Collector of the Revenue. When so fixed, no valid election can be held at any other time. *State ex inf. v. Smith*, 152 Mo. 521; *State ex inf. v. Dobbs*, 182 Mo. 367; *State ex rel. v. Jenkins*, 43 Mo. 265; *In re Woolbridge*, 30 Mo. App. 618. (d) Sec. 11432, R. S. 1909, "makes no provision for the election of a collector for an unexpired term." *State ex inf. v. Herring*, 208 Mo. 729. The statutes make no provision for an election for collector except for a regular, full, four-year term. *State ex inf. v. Herring*, 208 Mo. 729. (3) The city of St. Louis is not only a city but also a county

State ex inf. v. Koeln.

charged with the same functions, in its relations with the state at large, and with the State government, as all other counties. Constitution, art. 9, secs. 20 to 25; *State v. Rebenack*, 135 Mo. 350; *Staub v. St. Louis*, 175 Mo. 414; *Brown v. Marshall*, 241 Mo. 738. The collector of a county is a State officer, performing functions within the limits of his county. *Henderson v. Koenig*, 168 Mo. 356. The office of collector in the city of St. Louis is a State office. It was so treated prior to the Constitution of 1875. Laws 1871-1872, sec. 105. It was so treated by the Constitution of 1875, Constitution, art. 9, sec. 23. It has been so treated by subsequent legislation. Laws 1905, p. 272, now Sec. 11432, R. S. 1909. By the Constitution itself the Legislature has the same power over the city of St. Louis as it has over other cities and counties. Constitution, art. 9, secs. 20 to 25; *State v. Telephone Co.*, 187 Mo. 83; *State ex rel. v. Stobie*, 194 Mo. 53. The collection of revenue in St. Louis is a subject under control of the Legislature, just as in all other counties in the State. *State ex rel. v. Alt.*, 224 Mo. 510. The collector in St. Louis, being a county officer prior to the adoption of the Constitution of 1875, and being so treated by the Constitution itself and by subsequent legislation, the adoption of the charter could not change the character of the office. It still remains a county or State office. *Henderson v. Koenig*, 168 Mo. 367. Sec. 11432, R. S. 1909 (being the Act of 1905), cannot be construed so as to exclude the city of St. Louis. To do so would be to construe that act as special or local. The general law is not only capable of being construed so as to apply to all collectors in the State, including the collector in St. Louis, but the statutes specifically so provide. R. S. 1909, secs. 8057, 11434, 11448, 11460, 11464, 11471, 11476, 11481-XIV, 11481-XV.

Charles W. Bates and *Edward W. Foristel* for respondent.

(1) Sec. 11432, R. S. 1909, annuls section 1, article 4, of the old charter of the city of St. Louis in so far as

it relates to the office of Collector of Revenue; also section 34 of article 5 of the old charter, which section undertakes to define his duties. Constitution 1875, art. 9, secs. 14, 20, 23, 25; *St. Louis v. Dorr*, 145 Mo. 482; *State ex rel. v. Railroad*, 117 Mo. 1; *Ewing v. Hoblitzelle*, 84 Mo. 64; *State ex rel. v. Jost*, 265 Mo. 72; *Peterson v. Railroad*, 265 Mo. 506; *Kansas City v. Scarritt*, 127 Mo. 642; *State v. Bennett*, 102 Mo. 356; *State ex rel. v. Bell*, 119 Mo. 70; *State ex rel. v. Mason*, 153 Mo. 23; *Kansas City v. Hallette*, 59 Mo. App. 160; Sec. 8057, R. S. 1909. (2) Unless the Act of 1905, providing for collectors of the revenue, now Sec. 11432, R. S. 1909, applies to the city of St. Louis, then it is a special law and a local act within the meaning of section 53, article 4, of the Constitution, and is void as being in contravention of the express terms of the Constitution. *Henderson v. Koenig*, 168 Mo. 356. (3) Respondent was legally elected Collector of the Revenue of the city of St. Louis at the general election held on November 7, 1916, and by virtue of such election assumed the duties of collector, the office at that time being vacant, there never having been an incumbent. *State ex rel. v. Roach*, 269 Mo. 500; *State ex rel. v. Herring*, 208 Mo. 729; Constitution, art. 5, sec. 11; Sec. 5828, R. S. 1909; *State ex inf. v. Amick*, 247 Mo. 292. (4) Respondent assumed the duties of the office to which he was elected November 7, 1916. The office of Collector of the Revenue having been established in the city of St. Louis by the Act of 1905, now Sec. 11432, R. S. 1909, and the office having been vacant from the time of its establishment by the Act of 1905, the Governor of Missouri having failed to act in filling the vacancy the people at the general election in 1916 undertook to elect, and did elect, respondent to fill the office of Collector of Revenue of the city of St. Louis. Thereafter, respondent received his certificate of election to such office from the election commissioners of the city of St. Louis, qualified by filing his bond, taking the oath of office and entering upon the discharge of his duties, and was filling the office when the Governor appointed May, so that there was no vacancy when the Governor,

after having failed for four years to fill the office by appointment, undertook to appoint May. Sec. 5828, R. S. 1909.

Charles H. Daues and William H. Killoren, amici curiae.

(1) Under the Constitution the city of St. Louis is authorized to frame a charter for the government of the city. Article 9, sec. 20, Constitution. (2) Under the Constitution and laws the city of St. Louis is authorized by charter and ordinance to provide for the collection of State revenue. Sec. 11546, R. S. 1909; Art. 9, sec. 23, Constitution; State ex rel. v. Finn, 8 Mo. App. 348; State ex rel. v. Walsh, 69 Mo. 408; State ex rel. v. Mason, 4 Mo. App. 379. (3) The repeal of a special act could not of itself put in force within the county of St. Louis the provisions of the general law applicable to the remainder of the State, notwithstanding the fact that the provisions of the general law are the same as those contained in the special law. State ex rel. v. Watson, 71 Mo. 470. (4) The city of St. Louis can only act through the instrumentality of its officers. State ex rel. v. Walsh, 69 Mo. 408; State ex rel. v. Mason, 4 Mo. App. 377; State ex rel. v. Finn, 8 Mo. App. 341. (5) All elective officers of the State are chosen at the general election held biennially on the Tuesday next following the first Monday in November. Article 8, sec. 1, Constitution. (6) The charter of 1876 as well as the charter of 1914, adopted by the people of the city of St. Louis, provides that all elective officers required by the charter or ordinance shall be chosen on the first Tuesday in April, and every four years thereafter. Pursuant thereto the Collector of the Revenue for the city of St. Louis, for the past forty years has been elected in April. Art. 2, sec. 1, Charter of 1876; Art. 2, sec. 1, Charter of 1914.

WILLIAMS, J.—This is a proceeding in *quo warranto* instituted in this court by the Attorney-General to oust respondent from the office of Collector of the Revenue of the city of St. Louis.

The facts of the case, concerning which there is now no dispute, are correctly stated in his brief, by the learned Attorney-General, as follows:

"The first count of the petition is in the customary form in *quo warranto*.

"The second count informs the court and alleges that the respondent received the highest number of votes for the office of collector at a certain election held in St. Louis in April, 1914 (1913), but that the respondent was not elected and could not be legally elected at that time, and that by section 11432 of the Revised Statutes of 1909, it is provided that collectors should be elected at the general election in 1906 and every four years thereafter, but that respondent was not elected in 1906, nor at any general election occurring thereafter.

"That certain proceedings were taken by the Republican City Central Committee in October, 1916, in attempting to nominate the respondent for the office of collector, to fill a vacancy then existing in said office for the term ending in March, 1919; and the respondent appeared before the Board of Election Commissioners of said city and urged that there was a vacancy then existing in the office, employed counsel to represent him before the said board, and filed a brief in support of his contention.

"That thereafter the Board of Election Commissioners caused ballots to be printed for the general election to be held on the 7th day of November, 1916, whereon they printed the name of the respondent as a candidate for the office of collector for the said unexpired term; and at that election he received the largest number of votes cast.

"That on December 14, 1916, the Governor of the State, Hon. Elliott W. Major, appointed and commissioned Sidney S. May to the office of Collector to fill the said vacancy alleged and claimed by the respondent. Mr. May executed the bond required by the statute, in duplicate, in the sum of seven hundred and fifty thousand dollars, with the United States Fidelity and Guaranty

Company as surety thereon, this company being authorized to do business in Missouri and to become surety on such bonds. Mr. May filed one of the duplicate bonds with the State Auditor, and procured his certificate of approval thereof. He then presented the other duplicate of said bond to Hon. Henry Kiel, Mayor of St. Louis, requesting his approval thereof. (Mayor Kiel refused to approve the bond upon the sole ground, as found by the special commissioner, that he had already approved the bond of defendant Koeln.) Mr. May then offered to file his bond with the City Register, the official custodian of such documents in St. Louis, and on the same day, December 16, 1916, he exhibited his commission and the certificate of approval of his bond by the State Auditor to the respondent and demanded of him the possession of the office, together with the papers and documents belonging to it. Respondent refused to surrender the office.

“The respondent’s return alleges his own qualifications to hold the office, and these are not denied by the relator. He also alleges the fact of a city election in April, 1913, substantially as does the relator, and the fact that he received the highest number of votes and his subsequent qualification and assumption of the duties of the office by him. Respondent then alleges that for a long time prior to October, 1916, a vacancy existed in the office of Collector of Revenue in St. Louis and that he was nominated by the Republican City Central Committee, no person having filed any declaration for nomination under the primary law; that the Democratic City Committee nominated H. C. Menne, and that at the election respondent received the highest number of votes. He then alleges that the election commissioners of said city issued to him a certificate of election for said unexpired term; that on December 8, 1916, he qualified by giving bond, which was duly approved by the Mayor and the State Auditor, and took possession of the office.

“In answer to the second count the respondent repeats his allegations respecting the city election in

April, 1913, and denies that he was not legally elected at said election. He then admits the provisions of section 11432, Revised Statutes 1909, admits that he was not elected Collector at the general election in 1906, and alleges that he was elected at the general election November 7, 1916, to fill the unexpired term ending March, 1919.

"He admits that he contended, before the Board of Election Commissioners in St. Louis, that a vacancy existed in 1916, and that he ran for the office for the unexpired term on a nomination by the Republican City Central Committee.

"Respondent also admits that the Governor appointed Mr. May on December 14, 1916, but denies that the appointment was valid, and also alleges that Mr. May was ineligible to hold the office because of the fact that he had been appointed a member of the Board of Election Commissioners for a term expiring January 15, 1917."

If respondent has legal title to the office in question it is by reason of having been duly elected thereto. He presents no other basis for his claim. If he was legally elected thereto then it must have been either at the April, 1913, city election or the November, 1916, general election, because reference is made to no other election.

The legal questions calling therefore for an answer upon the issues of the present record may be summarized broadly as follows:

1. Was respondent legally elected to this office at the April, 1913, city election for a term of four years?

2. If the above question is answered in the affirmative, it will determine the case. If that question is answered in the negative then the next question arising is: Was respondent *legally* elected at the general election held November 7, 1916?

3. If the second question is answered in the negative the case is again at an end; but if the second question is answered in the affirmative then the next question arising is: When, after the November, 1916, election

should respondent be permitted to enter upon the discharge of the duties of the office?

These in their order.

I. Was respondent legally elected to this office at the April, 1913, city election? **Election of Collector at Spring Election: Acts of 1905.** We think not. Both the relator and respondent in their respective briefs agree with us upon this proposition.

Learned attorneys, in behalf of the city of St. Louis, appearing, by leave of this court, as *amici curiae*, alone question the soundness of this position. And since the question is one which must be determined by the law and not by consent or desire of parties, it is but proper that we consider the advice of our friends before passing to the other questions involved.

The view expressed by *amici curiae* is that at the time of the 1913 city election (and even yet), the office of Collector of the Revenue in the city of St. Louis, was and is a city office as contradistinguished from a county or State office and that the law governing the elections held for the purpose of filling such office was contained in the charter of said city rather than in the general statutes of the State.

If the above legal contention is correct respondent would now be entitled to hold the office, because the admitted facts show that in pursuance of said charter provisions he was at the April, 1913, election elected to hold this office for a term of four years, which term would carry him safely by the present date of controversy.

In opposition to this view, however, both the relator and respondent in their briefs contend that the Collector of Revenue for the city of St. Louis is a State (county) officer and his election is to be governed by the statutes of the State and that since the statutes of the State made no provision for an election to be held in April, 1913, a legal election was not then held which would entitle the respondent to now hold the office.

Article 4, section 1, St. Louis Charter of 1876, then in force, was as follows:

“The following named city officers shall be elected by the qualified voters of the city, and shall hold their office for a term of four years, and until their successors shall be duly elected and qualified, viz: a mayor, comptroller, auditor, treasurer, register, *collector*, recorder of deeds, inspector of weights and measures, sheriff, coroner, marshal, public administrator, president of board of assessors, and the president of the board of public improvements.”

Article 2, section 1, of the same charter provides:

“A general election of all elective officers required by this Charter, or by any ordinance of this city, shall be held on the first Tuesday in April, 1877, and every four years thereafter, except as otherwise provided in this charter and the scheme.”

Section 11432, Revised Statutes 1909 (Laws 1905, p. 272), provides:

“The offices of sheriff and *collector* shall be distinct and separate offices in all the counties of this State, and at the general election in 1906, and every four years thereafter, a collector, to be styled the collector of the revenue, shall be elected in all the counties of this State, who shall hold their office for four years and until their successors are duly elected and qualified: Provided, that nothing herein contained shall be so construed as to prevent the same person from holding both offices of sheriff and collector.”

Section 8057, Revised Statutes 1909 (Act of 1879), provides:

“Whenever the word ‘county’ is used in any law, general in its character to the whole State, the same shall be construed to include the city of St. Louis, unless such construction be inconsistent with the evident intent of such law, or of some law specially applicable to such city.”

It will appear from the foregoing quoted sections of the charter and statutes that there is an apparent

conflict of law with reference to the election of a collector of the city of St. Louis.

The following provisions of the Constitution of Missouri, 1875, may be briefly mentioned as applicable, viz: Article 9, section 20, gives to the city of St. Louis the right, in the manner therein designated, to adopt "a scheme" and "a charter in harmony with and subject to the Constitution and laws of Missouri," and provides that the charter and scheme when adopted shall "take the place of and supersede the charter of St. Louis and all amendments thereof and all special laws relating to St. Louis County."

Section 23 of the same article provides that "such charter and amendments shall always be in harmony with and subject to the Constitution and laws of Missouri. . . . The city as enlarged shall . . . collect the State revenue and perform all other functions in relation to the State in the same manner as if it were a county as in this Constitution defined."

Section 25, same article, provides:

"Notwithstanding the provisions of this article, the General Assembly shall have the same power over the city and county of St Louis that it has over other cities and counties of this State." (Italics ours.)

The process of logic by which is determined whether the Collector of the city of St. Louis is a city officer or a State officer is apt to become confused by reason of the singular and peculiar relationship which the city of St. Louis bears to the State. Loosely speaking any officer elected by the suffrage of the city of St. Louis might be termed a city officer, at least in the sense that he is elected by the vote of the city. The character of the electorate, however, should not necessarily determine the character of the office. The territory confined within the boundaries of the city of St. Louis forms a political subdivision of the State. This territory has no county organization in the ordinary use of that term, but by the Constitution the said city is to "collect the State revenue and perform all other functions in relation to the State in the same manner as if it were a

county as in this Constitution defined." If this political subdivision of the State were styled a county no confusion would arise in arriving at the conclusion that the person whose duty it was to collect the State taxes was an officer of the State and that his election would be a subject of legislative control.

Why then should the election of the Collector of the Revenue of the City of St. Louis (a separate political subdivision of the State which, under the Constitution, bears the same relationship to the State as a county), who, at least so far as collecting the revenue ordinarily collected by a county collector is concerned, performs the same governmental function, be controlled by a law different from that which controls the election of collectors in the other political subdivisions (counties) of the State? No reason is apparent why the election of one should be controlled by a law different from that applying to other officers exercising a like governmental function, and none can be said to exist unless perchance the power of control over the election of this officer in the city of St. Louis was, by the Constitution, permanently transferred to the charter making power of said city.

It is unnecessary here to enter into a detailed historical discussion of the well known events surrounding and leading up to separation of the city of St. Louis from the county of St. Louis whereby the city of St. Louis became a separate political subdivision of the State; but a statement of a few of the conditions then existing and a review of the constitutional provisions with reference thereto will be sufficient.

Prior to the separation of the city from the county of St. Louis, which occurred in the year 1876 a special law applicable to the county of St. Louis was in existence providing for the election of a collector for said county. [Laws 1871-2, sec. 104, p. 105.]

Under the Constitution existing in 1872 such special laws were permissible. It has been shown above that the Constitution of 1875, which provided for the separation of the city from the county and authorized the mak-

ing of a scheme and charter, provided also that said scheme and charter when adopted should take the place of and supersede all special laws relating to St. Louis County. This was undoubtedly a very wise provision, making for harmony rather than chaos and confusion upon the occurrence of the act of separation then in contemplation, but of course not definitely foreknown.

The charter (Charter, art. 4, sec. 1, and art. 2, sec. 1, *supra*) did provide for electing a collector to collect the revenue from the territory embraced within the city after separation.

But was it intended by this constitutional provision that the charter provision thus superseding the said special laws should for all future time be the controlling law upon the subject-matter covered by said special laws? In other words, was it the intention of the Constitution to forever withdraw from general legislative control the right to prescribe the manner of electing a collector of the revenue for the political subdivision of the city of St. Louis? Or was it the intention merely to provide a convenient rule of conduct in such matters until such time as the General Assembly of the State should, in a legal way, otherwise provide? That the latter was intended, is, we think, clearly evident by the language of section 25, *supra*, appearing in the same article of the Constitution, viz: "Notwithstanding the provisions of this article, the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties of this State." [Ewing v. Hoblitzelle, 85 Mo. 64, l. c. 76 et seq.] The following authorities also support the general principles here underlying: State ex rel. v. Railroad, 117 Mo. l. c. 11-12; St. Louis v. Klausmeier, 213 Mo. 119, l. c. 129-130; Peterson v. Railroad, 265 Mo. 462, l. c. 504.

That the General Assembly has the power to legislate with reference to the subject of electing collectors of revenue in the different counties of the State there can be no doubt. Having that power over the respective counties, it necessarily follows from the above con-

stitutional mandate that it also has this same power over the political subdivision of the State known as the city of St. Louis.

Having reached the conclusion that the General Assembly has the power to so legislate, we have next to ascertain whether it has exercised that power.

Section 11432, *supra* (Act of 1905), provided that "at the general election in 1906, and every four years thereafter, a collector, to be styled the Collector of the Revenue shall be elected in all the counties of this State, who shall hold their office for four years." Section 8057, *supra* (Act of 1879), provides that "Whenever the word 'county' is used in any law general in its character to the whole State, the same *shall* be construed to include the city of St. Louis, unless such construction be inconsistent with the evident intent of such law, or of some law specially applicable to such city."

Whether the General Assembly had exercised this power to legislate upon this subject prior to 1905, we need not here stop to consider. We have no hesitancy, however, in saying that by the Act of 1905, *supra*, it *did* exercise such power. And it not being apparent that a valid reason exists for electing a collector in the political subdivision of the city of St. Louis at a time different from that in the other political subdivisions of the State, we hold that the law should apply to each political subdivision thereof. To hold otherwise would be to give the act a construction which would render the same unconstitutional as in violation of article 4, section 53 (32) of the Constitution (the inhibition against special laws where a general law can be made applicable). And such a construction, under the circumstances here presented, would violate one of the well known canons of statutory construction. [State ex rel. v. Mason, 153 Mo. 23, l. c. 49; 6 R. C. L. 78, sec. 77; 2 Lewis's Sutherland, Statutory Construction (2 Ed.), par. 498.]

We, therefore, hold that the Act of 1905, sec. 11432, *supra*, applies to the city of St. Louis, and that, at least since the Act of 1905, *supra*, the general statutory law of the State, and not the charter of the city, controls the

matter of electing or filling the office of Collector of the Revenue for the city of St. Louis.

The points above ruled do not conflict with the rulings upon the points held in judgment in the cases of State ex rel. v. Finn, 8 Mo. App. l. c. 348; State ex rel. Burden v. Walsh, 69 Mo. 408; State ex rel. v. Mason, 4 Mo. App. l. c. 379-80; State ex rel. v. Watson, 71 Mo. 470, cited and relied upon by *amici curiae*.

II. Was respondent legally elected at the November, 1916, general election? We have reached the conclusion that this question must be answered in the affirmative.

It stands conceded upon the facts disclosed by this record that *if* there was authority of law for electing a Collector for an unexpired term then respondent was duly elected. No point is made of any existing irregularities which would invalidate respondent's election if an election were authorized.

But the contention of relator is that since section 11432, *supra* (Act of 1905), definitely fixing the term of office at four years and the time of election in 1906 and every four years thereafter, did not make specific provision for elections to fill unexpired terms, upon vacancies occurring, it thereby evidenced a legislative intent that no elections should be held in off years to fill an unexpired term of that office, and that therefore the prior enactment on elections for unexpired terms to fill vacancies (Sec. 5828, R. S. 1909) should not apply.

Relator relies upon State ex rel. Evrard v. Roach, 269 Mo. 500, and State ex inf. v. Herring, 208 Mo. 708.

The Evrard case deals with the question of election with reference to the office of State Superintendent of Public Schools and holds that the constitutional provision, viz., "the Superintendent of Public Schools shall be elected, at the general election in the year one-thousand-eight-hundred and seventy-eight and every four years thereafter," was controlling with reference to the subject of elections held to fill that office and that the Legislature

was without authority to provide for an election for that office at any different time. That case cannot be said to be an authority upon the point here presented. Here we have no constitutional provision directing the time for holding elections of collectors. The point here for determination is not whether the Legislature *has the power* to provide for election of collectors for an unexpired term (a point which will be conceded by all), but whether the Legislature has exercised its conceded power in so providing.

A careful reading of the Herring case, *supra*, will also disclose that it is not in point. In that case the court was dealing with the question with reference to the time the relator, elected at the general election in the year 1906 for a full term as county collector, should be entitled to the office, or stated the other way, how long should the respondent, an appointee of the Governor, appointed to a vacancy occurring during the last year of a full term, be permitted to hold the office. It should not be said that that case undertook to settle the law on a question not before it, to-wit: Can there be an election of a collector in an off year to fill the unexpired term, a vacancy in such office having occurred prior thereto, as in this case?

Section 5828, Revised Statutes 1909, is as follows:

“Whenever any vacancy, caused in any manner or by any means whatsoever, shall occur or exist in any State or county office originally filled by election by the people, other than the office of Lieutenant-Governor, State Senator, Representative, Sheriff or Coroner, such vacancy shall be filled by appointment by the Governor; and the person so appointed shall, after having duly qualified and entered upon the discharge of his duties under such appointment, continue in such office until the first Monday in January next following the first ensuing general election—at which said general election a person shall be elected to fill the unexpired portion of such term, or for the ensuing regular term, as the case may be, and shall enter upon the discharge of the duties of such office the first Monday in January next follow-

ing said election: Provided, however, that when the term to be filled begins or shall begin on any day other than the first Monday in January, the appointee of the Governor shall be entitled to hold such office until such other date."

That the language of the above section is sufficiently comprehensive to include the office of county collector all will concede. This section was a part of the existing law when the Act of 1905, section 11432, *supra*, was passed. It was therefore unnecessary that the Legislature in the Act of 1905 should have specifically provided for elections to fill unexpired terms. Their failure so to do is evidence of the fact that they knew of the then existing statute which would apply and cover the matter of elections for unexpired terms rather than evidence of an intention to have no statute on the subject. It is a well established rule of statutory construction that statutes *in pari materia*, even though enacted at different dates, are to be construed together and if possible given such construction as will harmonize and give effect to all the provisions. [State ex inf. v. Standard Oil Co., 218 Mo. 1, l. c. 355, and cases therein cited; 2 Lewis's Sutherland, Statutory Construction (2 Ed.), par. 443; Frost v. Wenie, 157 U. S. l. c. 58.]

Applying the above rule, we hold that section 11432, *supra*, providing the time of holding elections for a full term does not conflict with the provisions of section 5828, *supra*, providing for elections to fill unexpired terms, but that the two are in harmony with each other, supplying a complete statutory rule with reference to elections for this office.

III. Having reached the conclusion that respondent was legally elected for an unexpired term at the November, 1916, general election, we are now to determine when respondent takes his office by virtue of said election.

**Entrance
Into Office.**

Relator contends that respondent should not enter upon the discharge of the duties of the office until the first Monday in March, 1917. Respondent contends that

he was entitled to take the office immediately after the election. No authorities are cited.

The term of the office of collector begins on the first Monday in March. [Sec. 11448, R. S. 1909; State ex inf. v. Herring, 208 Mo. 708, l. c. 728.]

Section 5828, supra, in effect provides that a person elected for an unexpired term shall enter upon the discharge of the duties of such office the first Monday in January next following such election unless the term to be filled (here the term of the office of collector) begins or shall begin on any day other than the first Monday in January, then upon such date (in this case the first Monday in March, 1917).

It will be noticed that said section which provides for an election for an unexpired term also provides for an appointment by the Governor to fill such vacancy until the time therein specified.

Under the admitted facts in this case the vacancy existed at least prior to June 1, 1916. How long prior thereto the purposes of this case do not call for an answer. The Governor, however, did not undertake to exercise his power of appointment until December 14, 1916.

Respondent in his brief admits that had the Governor made his appointment prior, instead of after, the general election of 1916, the respondent could not have taken office under such election until the first Monday in March, 1917, but contends that since the Governor failed to appoint prior to said election he had no right to appoint thereafter, and, for that reason, respondent (no one else having a better title), had the right to assume the duties of the office.

Since the above mentioned section, upon the occurrence of a vacancy as here existed, gave the Governor the power to appoint a person who, under the terms of the statute, would hold until the first Monday in March, 1917, and since the act does not declare when the appointive power must be exercised, we are of the opinion that the fair construction of the statute is that the Governor may exercise that power at any time before the

expiration of that period and the man so appointed would hold until the first Monday in March, 1917. *There is no proviso in the statute* which says in the event the Governor fails to appoint prior to the date of election that thereupon the elected person shall immediately assume the office, and we are without the authority to write such a *proviso* in the statute.

Under the statute, therefore, respondent's title comes through and by virtue of the rights incident to his election, and not through any default or delayed action upon the part of the appointing power.

From the conclusions reached above, it follows that the respondent is not entitled to enter upon the discharge of the duties of said office until the first Monday in March, 1917, and that the writ of ouster should be awarded. It is so ordered.

Graves, C. J., Walker, Faris and Blair, JJ., concur; Bond, J., concurs in result; Woodson, J., dissents.

THE STATE ex rel. ST. JOSEPH WATER COMPANY, Plaintiff in Error, v. LUCIAN J. EASTIN et al.

In Banc, February 26, 1917.

1. **CONTRACT: Water Supply to Citizens Outside City: Abrogation by Extension of City Limits.** An existing contract fixing a rate for water service and bottomed on a valuable consideration, between a private consumer who lives outside the city limits, and a public utility company operating within the city, is not abrogated and the parties are not bound by the city's water rates *ipso facto* when the consumer is taken into such city by the extension of its limits. [Overruling State ex rel. Waterworks Co. v. Geiger, 246 Mo. 74.]
2. ———: **Between City and Water Company: Rates Subject to Alteration by City.** Under the statute declaring that "when water shall be taken by private individuals from any waterworks not owned by the city, the mayor and common council shall have the right, by 270 Mo.—13

ordinance, from time to time, to fix the rates to be charged therefor," a public water company is to be held to have contracted with the city with full imputed knowledge of and subject in all ways to all powers and restraints connoted by said statute, and is bound thereby just as fully as if it had been written at large in its franchise contract with the city, and no reduction of rates by ordinance would amount to a violation of the obligation of a special contract between the company and a consumer who stands in exact equality with other consumers. But an independent contract of a water company (which has a franchise contract with the city to furnish water to its inhabitants) to furnish water at higher rates to a consumer outside the city limits, running for a limited and reasonable term, based upon a valuable consideration not paid by city consumers, in which the consumer does not reserve to himself any right of regulation and is not authorized by any statute to regulate rates, is not abrogated or impaired by the extension of the city limits so as to include said consumer, and he does not satisfy the obligation of said independent contract by paying the rates imposed by the franchise contract upon consumers of like amounts of water residing within the city prior to such extension.

Held, by WOODSON, J., dissenting, that the consumer in this case (State Hospital No. 2) was not a private citizen, but a public corporation, incorporated for governmental purposes, and both it and the water company contracted with each other knowing the public character of the other and their mutual rights and obligations, and, independent of the contract, it became the legal duty of the water company, after the extension of the city limits, to furnish the hospital water in the same manner and at the same rates it furnished it to others within the extended territory.

3. ———: **Extension of City Limits: Ordinances Applicable to Annexed Territory.** The rule that in all ordinary matters and things the ordinances of an annexing city are at once and automatically extended over the annexed territory does not affect existing private contracts which were not subject to regulation by ordinance at the time they were made.
4. **ORDINANCE: Void Only in Its Application.** An ordinance or statute may be void only in its application. A rate-fixing ordinance may be valid as to all consumers except to those to whom if applied it would impair or abrogate a valid existing private contract.
5. **LAW OF CASE: Different Suit.** Whether or not it be true that the law as declared by the court on one appeal continues to be law of that case upon a subsequent appeal, the rule has no application to a new and separate action.
6. ———: ———: **Mandamus: Demurrer Sustained.** If it no where appears in the alternative writ that a suit by mandamus has previously been brought, and the facts of a former suit are not set forth

therein, an appeal from the ruling of the trial court sustaining a demurrer to the alternative writ is not a second appeal, and hence it cannot be held that the rulings on appeal in a former mandamus case have become the law of this second suit.

7. **APPEAL: Facts of Former Suit: Judicial Notice.** The Supreme Court takes notice of a former appeal and the record thereof, but does not notice the facts and records in one action when called upon to rule another and separate action.

Error to Buchanan Circuit Court.—*Hon. Thomas B. Allen*, Judge.

REVERSED AND REMANDED (*with directions*).

John E. Dolman and *Vinton Pike* for plaintiff in error.

(1) The ordinance extending the city limits, if given the effect declared by the judgment below, is such an exercise of legislative power delegated by the General Assembly, as may properly be considered a law within the meaning of the provision of the Constitution forbidding the impairment of contracts. Fed. Stat. Ann., vol. 8, p. 863, art. 1, sec. 10, par. b. (2) The effect of the passage of the ordinance passed and approved by the city of St. Joseph, July 6, 1909, as construed by the judgment in this case is to impair the obligation of the contract of 1900 between the city of St. Joseph and plaintiff in error. Under this contract the water company was under no obligation to extend its mains, except where the city by ordinance directed it to do so, and when so directed the city was obligated to rent one hydrant for each five hundred feet of such extension at an annual rental of forty dollars during the term of the contract; and also under this contract the Water Company was under no obligation to furnish water at the same rates to any but private consumers, the State Hospital being a public institution, and therefore a public consumer not supported by municipal taxes as provided in the contract did not come within the terms of the contract specifying a six cent rate for private consumers. The effect given by the judgment to the ordinance of

July 6, 1909, extending the limits of the city, is to require the water company to furnish water to this public institution through a pipe line constructed partly over private property, solely by virtue of a private contract entered into in 1905 with said hospital authorities, and not by virtue of any ordinance of the city, at the same rate it is by its contract with said city required to furnish private consumers, and without the payment to it of any hydrant rental, as is required to be paid under said city contract, which rental would in this instance amount to over four hundred dollars per annum, the pipe line in question being about a mile in length. The effect thus given to the ordinance impairs the obligation of said contract between the city and the water company of date March 7, 1900, and deprives plaintiff in error of its rights under said existing contract to the extent stated. *Walla Walla v. Water Co.*, 172 U. S. 1; *Railroad v. Texas*, 177 U. S. 66; *Railroad v. Alsbrook*, 146 U. S. 279; *Bacon v. Texas*, 163 U. S. 207; *Water Co. v. Easton*, 121 U. S. 38; *Water Co. v. Sugar Co.*, 125 U. S. 18; *Railroad v. Tennessee*, 153 U. S. 486; *Light & Power Co. v. Portland*, 201 Fed. 119. (3) The effect of the passage of the extension ordinance of 1909, referred to, as construed by the court below, creates a new right, viz., the right of a public institution to receive water at the same rate as a private consumer, and imposes a new duty, viz., the furnishing of water through a private pipe line constructed under a private contract, prior to the passage of the extension ordinance, without the payment of any hydrant rental, the creation of which new right and the imposition of which new duty are substantially antagonistic to the obligations of the contract of 1900 between the city and the water company. *Light Co. v. St. Paul*, 181 U. S. 142; *Trust Co. v. Columbus*, 203 U. S. 311; *Railroad v. Duluth*, 208 U. S. 583.

John T. Barker, Attorney-General, for defendants in error.

This cause has been once decided by this court. *State ex rel. v. Geiger*, 246 Mo. 74. In that action plain-

tiff in error in this suit sued out of this court an alternative writ of mandamus against the then board of managers of State Hospital No. 2 to compel payment of \$2186.33 alleged to be due at that time under the same contract and under conditions exactly similar to those alleged in the petition in the present case. In fact the \$2186.33 then sued for constitutes a part of the \$16,279.84 sued for in this action—the excess having accrued according to the contention of plaintiff in error since that suit was brought. The issues in the two cases were identical. When the case was in this court before, the decision was based upon the ground that “the contract of 1905 between relator and the board of managers was abrogated by the annexation to the city of the territory upon which the hospital was situated, and the rate as fixed by the ordinance must determine the price to be paid for water thereafter used by the hospital.” It was further ruled that there was nothing in the contract that prevented the application of the rate fixed by the ordinance. It will thus be seen that the precise question previously decided upon the demurrer to respondent’s return, is raised for decision in this case by respondent’s motion to quash the alternative writ. The decision previously rendered is “the law of the case” and will be held to preclude a subsequent examination of the same issues between the said parties. “Where a court has once declared the law in a case, such declaration continues to be the law of that case even on a subsequent appeal.” *Railroad v. Baker*, 4 Ind. App. 66; *County Comrs. v. Pritchett*, 85 Ind. 68; *Richmond St. Ry. Co. v. Reed*, 83 Ind. 9; *Howe v. Fleming*, 123 Ind. 262. “The law of the case consists, not in the reasoning of the court or in the illustrations given, but in the propositions of law actually decided and applicable to the facts in judgment.” *Heidt v. Minor*, 113 Cal. 385. “A rule once made in a case by an appellate court, while it may be overruled in other cases, in binding both upon the inferior court and upon the appellate court itself. In a subsequent proceeding neither the lower court nor the court making the rule can depart from such ruling. A

State ex rel. v. Eastin.

ruling so made is said to be the law of the case." *Hastings v. Foxworthy*, 45 Neb. 676; *Sewing Machine Co. v. Leslie*, 118 Fed. 557; *Teakle v. Railroad*, 36 Utah, 29; *Malones Committee v. Lebus*, 96 S. W. (Ky.) 519; *Westerfield v. Insurance Co.*, 157 Cal. 339.

FARIS, J.—This is a proceeding by mandamus which comes to us on the writ of error of relator who was cast below, to compel defendants, who are defendants in error here, to audit and pay a certain account alleged to be due plaintiff in error for water delivered to State Hospital No. 2, of which defendants in error compose the board of managers.

The facts are few and simple. Those upon which the case turns, run thus: Relator, St. Joseph Water Company, is a public service corporation, organized under the laws of the State of Missouri. In the year 1900 an ordinance was passed, ratified by an election and accepted by said St. Joseph Water Company (hereinafter for brevity called relator), whereby the latter agreed to furnish water for a term of twenty years to the city of St. Joseph and to those of the inhabitants thereof who use water in specified large quantities, at the rate of six cents per thousand gallons. (Certain more definite details of this franchise contract will be hereafter set forth). In the year 1905 relator entered into a contract with said hospital, of which, as stated, respondents composed the board of managers, wherein it was agreed that connections should be made with the mains of the hospital by a water main of relator and water furnished to the hospital for a term expiring December 31, 1915, at the price of ten cents per thousand gallons. More certain and definite details of this contract, which was by relator in all things performed, will be hereafter specifically set out. At the time of the making of the contract between relator and the hospital, the grounds and buildings of the latter were situated outside of and about one mile from the city limits of the city of St. Joseph. In 1909, four years after the making of the contract by relator with the said hospital to furnish the

latter water, the city of St. Joseph, by an ordinance duly passed, extended its city limits so as to take in and include the whole of the territory occupied by the hospital. Whereupon, defendants in error (hereinafter called defendants for brevity) refused longer to abide by their contract to pay ten cents per thousand gallons for water, but insisted that the extension of the city limits so as to include the grounds and buildings of the hospital at once put in force the rate of six cents per thousand gallons, which prevailed as to large users in the hospital's class, pursuant to the franchise contract, in other parts of the city of St. Joseph. Thereafter, and from July, 1910, till December 31, 1915, when said private contract expired by its own limitations, defendant refused to pay the relator more than the sum of six cents per thousand gallons for water, and relator, with properly pleaded protest and duress, accepted said sum, but after the expiration of the full term of ten years, brought this action of mandamus to compel defendants to order the payment of the sum of \$16,279.84, being the alleged balance due, at ten cents per thousand gallons for water furnished after deducting the amount paid as aforesaid at the rate of six cents per thousand gallons.

Upon relator's filing in the circuit court of Buchanan County its petition aptly setting forth all of the above facts and more, an alternative writ of mandamus was issued, which likewise set forth all of said facts aptly. To this alternative writ defendants demurred, which demurrer, being by the court and the parties treated as a motion to quash the writ, was sustained, and plaintiff sued out its writ of error, and the case is now here for ruling upon the sole question of the correctness of the action of the court *nisi* in sustaining said demurrer.

Under the terms of the franchise contract made between relator and the city of St. Joseph, which is a city of the second class, it was agreed that relator shall maintain five hundred fire hydrants in said city, for which the city agreed to pay an annual rental of \$40 each; that relator shall maintain twenty-six public drinking fountains, for which the city shall annually pay the re-

lator the sum of \$50 each. It is further in said contract agreed that relator shall from time to time, as it may be by ordinance directed, extend its mains over the streets, highways and public lands of said city, and for every five hundred feet of mains extensions there shall be erected by relator and paid for by said city a fire hydrant, at the annual rental aforesaid. It is further agreed therein that water shall be furnished to all private consumers in said city and no partiality or inequality in rates shall be permitted.

The private contract above referred to and entered into between relator and the predecessors of defendants as members of the board of managers of said hospital, provided in pertinent substance that a six-inch main should be laid from the then end of relator's water mains on Brady Street, for a certain described distance, and that thereafter an eight- or ten-inch main should be laid to connect with the six-inch main on the grounds of the hospital; that the hospital should do all excavating and refilling of the trenches necessitated, while relator was to furnish all material and labor in laying said main; that upon the grounds of said hospital a six-inch meter should be furnished and set, which meter should have by-passes and gate-valves for the purpose of permitting the passing by of water free without measuring same through said meter, and inferably for fire protection purposes in said hospital. Relator also agreed to extend its mains into the hospital grounds and to erect thereon between five and ten fire hydrants, according as the hospital necessities might eventually require, and to lay in said hospital grounds, if necessary, three thousand feet of pipe.

It is averred in the petition and in the alternative writ that all of these things were done; that relator expended in the extension of its mains the distance of a mile, which was necessary, and in constructing its branch line and mains and in putting in the hydrants on the grounds of said hospital, the sum of more than \$12,000; that in said extension of relator's mains relator was compelled to and did build a branch main, which it is

stated ran for its entire length of a mile over private property outside of the city limits of said city of St. Joseph, and along which branch main for the distance aforesaid no hydrants were placed and along which none could be placed from which it would ever receive any revenue whatever from the city.

It is further alleged that in the ordinance which was approved on the 6th day of July, 1909, by which the limits of the said city were extended so as to include the grounds and buildings of said hospital, no provision was made for regulating the rates or the supply of water to said hospital; nor has any such provision so regulating such water supply, or the rates to be charged said hospital therefor, ever been made by any ordinance, or in any other manner, nor has any way been provided for compensation to relator for any loss or impairment of its contract obligation aforesaid, with said hospital.

It is contended by relator that the effect of the ordinance of the city of St. Joseph which extended the city limits so as to include the grounds and buildings of said hospital with which relator had a ten-year private contract, in the light of the construction placed on said ordinance, when same is read in connection with the provisions of the ordinance granting relator a franchise, is to impair and abrogate said contract between relator and said hospital, which said abrogation is contrary to and in violation of both article 5 and section 1 of article 14 of the Amendments to the Constitution of the United States. Wherefore, relator prayed for the issuance of a peremptory writ of mandamus, and an alternative writ having issued as stated, defendants demurred thereto, which demurrer being treated by the court *nisi* and the parties hereto as a motion to quash the alternative writ, was sustained, and the case is before us on appeal to contest the correctness of the ruling of the lower court in said behalf. The question agreed to be in issue as well as such other facts as may serve to illuminate that question, will be set forth in requisite detail in our opinion.

I. The concrete single point up for ruling is this: Is an existing contract fixing a rate for water service and bottomed on a valuable consideration, between a private consumer, who lives outside the city limits, and a public utility company operating in a neighboring city, abrogated and are the parties bound by the city's water rates *ipso facto* when the consumer is taken into such city by the extension of the city limits thereof?

Abrogation
of Contract:
Water Rates.

The question at issue is plain and concise, and upon the facts conceded can be fully ruled. That it is a nice and most difficult one is in no way attributable to the form in which it is presented. It would have been as nice a one if it had come up in an action for breach of contract, or *indebitatus assumpsit*, so we will not of our volition debate a question not mooted, but take the case as we find it; since the applicability of the remedy chosen, if the law upon the facts otherwise allow, is not questioned.

Approaching this question with full knowledge that the case of State ex rel. St. Joseph Waterworks Co. v. Geiger, 246 Mo. 74, held otherwise, we are yet constrained to disagree from the views taken by this Court in Banc in that case, and to hold that such a contract is not abrogated. The holding in the Geiger case was largely bottomed upon a quotation from the excellent work on corporations of the late Judge THOMPSON, wherein but a part of what the learned writer there said is quoted. Italicising for emphasis and distinction what is omitted from this writer, we quote in full:

“Until the Legislature or other body having the right to prescribe the rates to be charged by corporations, whose business is affected with a public interest, has exercised this power, the rates are the subject of contract between the corporation and its patrons. And this is the case where the Constitution makes it the duty of the Legislature to prescribe reasonable maximum rates, but the Legislature has failed to do so. Since, however, the franchise is taken subject to regulation by the State in the exercise of its police power, the conclu-

sion seems a sound one that the corporation cannot enter into a binding contract with a patron extending beyond the time when the Legislature or municipal council duly empowered thereto may fix the rates. It is plain that a public-service corporation able to forestall legislative action by contract for a limited time could do so for so long a time as to render futile any legislative control. *It has been held, however, in a case where a water company's franchise fixed the rates for service, and an ordinance conferred on the company the privilege of laying mains in additions outside the city limits, that independent contracts to furnish water to persons in these outside districts at higher rates were neither abrogated nor affected by the subsequent incorporation of these districts into the city proper.*" [3 Thompson on Corp. (2 Ed.), sec. 2953.]

We find no manner of fault with this excerpt, but merely content ourselves by saying that the portion of it quoted in the Geiger case does not apply in our opinion to the facts in the instant case, and by undertaking to show with the requisite quantum of deference, that it did not apply in that case. With the additional portion italicised by us and now for the first time in this behalf quoted, we of course find no fault, for it states, we submit, the applicable rule concisely, clearly, plainly.

We concede as a premise, that a city of the second class, such as St. Joseph is, may change and regulate, raise and lower water rates. In fact, when relator was granted, pursuant to a vote, the franchise contract evidenced by the ordinance of the year 1900, the below statute governing cities of the second class was and long had been in force therein, to-wit:

"The common council shall have the exclusive right to erect, maintain and operate waterworks within the limits of the city, and to regulate the same; to prescribe the rates at which water shall be charged to the inhabitants of such city when taken from said works, and acquire, by purchase, donation or condemnation, suitable grounds within or without the city, upon which to erect waterworks, and the right of way to and from said

works, also the right of way for laying water pipes within the limits of said city, all of which shall be done in such manner as prescribed by ordinance: *Provided*, that the mayor and council may, in their discretion, grant the right to any person or persons to erect waterworks and lay down pipes for the use of said city and its inhabitants upon such terms as the common council may by ordinance prescribe: *Provided*, that such right shall not extend for a longer period than twenty years, and shall not be granted nor shall be renewed unless by the consent of a majority of the qualified voters of said city, to be ascertained at an election held for such purpose: *Provided*, that when water shall be taken by individuals from any waterworks not owned by such city, the mayor and common council shall have the right, by ordinance, from time to time, to fix the rates to be charged therefor." [Sec. 9081, R. S. 1909.]

It is elemental that relator contracted with the city of St. Joseph with full imputed knowledge of, and subject in all ways to all of the powers and restraints connoted by the above section, and that it is bound thereby just as fully as if these provisions were written at large in its franchise contract with the city of St. Joseph. Having contracted in the light of the city's power of regulation, no reduction of rates would amount to a violation of the obligation of a contract, so far as this question goes as between the relator and the city, or as between relator and any private consumer residing in such city, and standing as regards relator, in exact equality with other consumers in the city. Illustrating this rule and sharply illuminating the extent of our concession, as to its far-reaching character, we note that in a case of seeming hardship it has even been applied in a criminal prosecution by the highest court in the land. [Armour Packing Co. v. United States, 209 U. S. 56.] In that case plaintiff in error, the Packing Company, being indicted for accepting a rebate from a common carrier, pleaded in defense the binding obligation of a contract for a rate less than the existing published tariff, which contract was made prior to the establishment, under au-

thority of the Interstate Commerce Act, of such tariff rate. But the conviction was sustained, notwithstanding, the Supreme Court holding (l. c. 82) that: "If the shipper sees fit to make a contract covering a definite period for a rate in force at the time, he must be taken to have done so subject to the possible change of the published rate in the manner fixed by statute, to which he must conform or suffer the penalty fixed by law."

Likewise, it was held in the case of *Des Moines v. Des Moines Waterworks Co.*, 95 Iowa, 348, where a public utility company had a contract for water service *with both a city and an adjoining town*, that upon the extension of the city limits over the town, the rates of the city applied to the inhabitants of the town and the contract of the utility company with the *absorbed* town for a different rate was abrogated. The books are fairly full of cases like the above (*People ex rel. Chicago v. Chicago Tel. Co.*, 220 Ill. 238; *Peterson v. Tacoma Ry. & Power Co.*, 60 Wash. 406; *Detroit v. Detroit United Ry. Co.*, 173 Mich. 314), wherein we submit, however, a palpable difference is manifest distinguishing the above class of cases from the instant one. One or two cases have been found wherein a similar rule was made upon a state of facts so different from the facts held in judgment in the *Des Moines* case, as possibly to call for a different rule, or a different reason for a similar rule. [*Indiana Ry. Co. v. Hoffman*, 161 Ind. 593, and cases following it and cited in *L. R. A.* 1916—A, 1072.]

But be this as may be, we think it manifest that none of these cases rule the instant one upon the facts up for judgment. We have set them out at so great length merely to emphasize and make plain the differences existing between them and the case at bar. We are not called on to criticise any of these cases; they seem to have been justly ruled, and we may content ourselves by distinguishing them. We can even find a fairly conclusive and satisfying reason for the difference in the rules applied. For the above were cases wherein the public utility had *franchise contracts* with both the annexed and annexing municipality. There existed there-

fore the power to regulate public service rates as to each of such existing franchise contracts, in both the annexed and annexing municipality. So, the franchise contracts in each municipality having been made with imputed reference to the power in each municipality to regulate rates, it follows that unless the rate in the *annexing* municipality was confiscatory (and being an agreed rate this contingency would doubtless be obviated by estoppel), no very serious objection could arise or be urged against applying the rate of the *annexing* city, rather than that of the *annexed* municipality. But in none of the above cases was there a special contract between the *private consumer and the public utility company*, entered into for a valuable consideration, as in the instant case. There was or seems to have been, in all of them a franchise contract, or ordinance with either the county in which the annexed territory lay before annexation, or with the town itself which was annexed; or, else, the utility company affected was a railroad organized as a common carrier by the State, which granted it a charter, and which charter carried as an inherent adjunct the power in the chartering authority to regulate the rates charged when and wherever such carrier might operate. [Indiana Ry. Co. v. Hoffman, 161 Ind. 593, and cases following it, supra.] In all such cases the franchise contracts which were so abrogated were made with the governing authorities of the annexed or absorbed municipality, and were concededly for the benefit of all of the inhabitants of such town, but nevertheless by statute or constitution these contracts were made subject to the power of rate-regulation by the authorities which granted them to the public service company affected. [Armour Packing Co. v. United States, supra.] *The situation presented by them does not turn as in the instant case, upon a private contract running for a limited and reasonable term, made with a private consumer for a valuable consideration, which consumer, by the terms of his contract, had not reserved to himself within the contract period any right of regulation, and who had behind him*

no statute retaining for him any power of rate regulation.

The holding announced in the case of Rogers Park Water Co. v. Fergus, 178 Ill. 571, laying down the rule governing applicatory rates in territory theretofore within a town which has been annexed to a city having a different rate, seems to be bottomed on correct principles; to nicely state the rule, and to put it upon reasoning at once logical and fair, and to be in consonance with other rules which affect and modify the situation. The above case held that the annexation of a town to a city, which city possessed statutory power to regulate rates of public utilities, authorized such city to reduce the rates which were being charged in the absorbed town, pursuant to a contract with the latter having thirty years to run, below the rates specified in such contract. In reaching this ruling the Supreme Court of Illinois said that the town ordinance fixing for thirty years the rate to be charged did not constitute an irrevocable contract, and that it was not a property right, but that by it the inhabitants of the town were only bound (*in any event, whether annexed or not, it might well have added*) to pay the rate fixed by the thirty-years ordinance, so long only as such rates, for that they had become unreasonable, might not be reduced by another ordinance. This case was affirmed by the Supreme Court of the United States. [Rogers Park Water Co. v. Fergus, 180 U. S. 624; Freeport Water Co. v. Freeport, 180 U. S. 587.]

But it is clear to us that the instant case does not, upon its plain facts, fall within the rule so clearly laid down above, nor do the principles announced rule it. On the contrary this case falls within the principle enunciated in the case of Denver v. Denver Union Water Co., 41 Colo. 77, wherein it was expressly ruled that the annexation to the city of territory outside the city limits did not have the effect of abrogating individual contracts made by the water company before annexation, with private consumers residing in such annexed territory. This view is likewise in full accord with the rule deduced by

the learned author of Thompson on Corporations, as set out above herein and emphasized by italics, in the excerpt which we quote from his most excellent work.

There is manifestly not much force in the reasoning—as a basis for the rule of abrogation—that since, in all ordinary matters and things, the ordinances of an annexing town or city are at once and automatically extended to and over the annexed territory, it follows that a rate-ordinance inevitably and without exceptions doth the like. Such a rule, we concede (*St. Louis Gaslight Co. v. St. Louis*, 46 Mo. 121; 28 Cyc. 215), exists and makes the annexing city's ordinances to apply automatically and immediately to the annexed territory, save and except in such matters wherein application of the rule would affect existing private contracts by impairing or abrogating them. [*Cloverdale Homes v. Cloverdale*, 62 So. 712.] An ordinance which would by the construction put on it have the effect to annul an existing private contract (which contract was not when made subject to regulation by the rate-making power) would be void because violative of the provision of the organic law forbidding the passage of a law violating the obligation of contracts. The ordinance itself would not of course be wholly void, but touching its application to those inimically affected by such a construction it would be void and non-operative in the particular aspect by which it made nugatory an existing and otherwise valid contract.

The limits-extension ordinances here is the usual one. It is intrinsically proper and seemingly beneficent. It becomes bad as against the organic law only in the event that the construction contended for by defendants is upheld. We have refused to uphold the construction which defendants urge. If we had done so, it is contended that such a construction would have involved a Federal question. As we have felt constrained upon the law and the facts to hold that the contract is valid and binding, the extension ordinance notwithstanding, and that the contract's obligations are not annulled by the provisions of the ordinance, that is merely tantamount

to saying in the language of the Supreme Court of the United States that the contract is "absolutely unaffected by the ordinance, which it is asserted brought about the impairment." [St. Paul Gas Light Co. v. St. Paul, 181 U. S. l. c. 149; Mercantile Trust Co. v. Columbus, 203 U. S. 311.]

We are not called on to consider whether a private contract for supplying water for ten years to a private consumer residing a mile from the company's mains, wherein connection was made at an expense to the water company of more than twelve thousand dollars, at ten cents per thousand gallons, was or was not so unreasonable as to have warranted a reduction upon proper and timely application therefor. That is not this case. We are only holding here upon the case made, that the contract was upon its face valid and binding (State ex rel. v. Geiger, 246 Mo. l. c. 100), and that it was not abrogated by the ordinance extending the city limits of the city of St. Joseph so as to include the State Hospital for the Insane, and that upon the admitted allegations of the alternative writ the demurrer should have been overruled. This view results in overruling the case of State ex rel. v. Geiger, 246 Mo. 74, so far as the same may conflict with our views here.

II. It is contended by the learned Attorney-General, as counsel for defendants, that we are bound by the decision in the Geiger case, *supra*; that right or wrong that case should rule this; that though we are at liberty to depart from that ruling in a new case or another similar case, we cannot do so here, because "where a court has once declared the law in a case, such declaration continues to be the law of that case even on a subsequent appeal."

We find no fault with the rule, and shall not take time to either re-examine it or quarrel with it. We may concede it for the purposes of this case, and stop to inquire neither as to its correctness nor as to the universality of its application unmodified. But the difficulty

we find in applying the rule to the facts here is that the rule fails to fit the facts. This case is here upon a sustained demurrer to the alternative writ. Such facts *and no more* as are set forth in such writ, are for the purposes of this appeal, the status of the pleadings considered, conclusively presumed to be the facts of the case. It nowhere appears in the alternative writ that this action has ever been here before. Therefore, this is a new action and not a second appeal; the parties are new and the subject-matter of the action is new, so far as we are now given to know. If, as counsel for defendants urges, the sum of \$2186.33, now included in the sum demanded, was embraced in a former action which was bottomed on an identical question of law, and between parties individually distinct but officially holding the same positions as do the parties herein, that matter can no doubt be adjusted when the answer comes in, as can other kindred matters. This is not a second appeal of the former case, but another case. The facts in the former case, we repeat, are not set forth in the writ here attacked, neither does it appear in such writ that there ever was such a former suit. We take notice of a former appeal and of the record thereof (*Keaton v. Jorndt*, 259 Mo. 179); but we do not notice the facts and records in one action when called on to rule another and separate one. [*Spurlock v. Railroad*, 76 Mo. 67; *Banks v. Burnam*, 61 Mo. 76; 16 Cyc. 918.] So as this case as now presented comes to us as an entirely new case, we are not bound by the law thereof as announced in the case of *State ex rel. v. Geiger*, supra, as "the law of the case," within the purview of the rule urged on us, and so as to render that rule binding on us whether it be in our view rightly ruled or not. But these matters should not prove difficult of solution or adjustment upon the trial of the case upon its merits.

Let it be reversed and remanded with directions to the learned trial court to overrule the demurrer to the alternative writ and to proceed with the case as counsel therein may be advised they ought to proceed, consistent-

ly however, with the views expressed herein. All concur except *Woodson, J.*, who dissents in separate opinion.

WOODSON, J. (dissenting)—I dissent from the majority opinion for the following reasons:

The State Hospital No. 2, located at St. Joseph, is a public corporation of the purest character—without an element or ingredient partaking of a private character.

Under these facts, the Water Company must be considered in the light of contracting with a public institution, and one of the State—incorporated, if not for governmental, for administrative purposes—in my opinion, the former. [State ex rel. v. Geiger, 246 Mo. 74, l. c. 97.]

State Hospital No. 2, being thus a public corporation, contracted as such with the company for water, both knowing the public character of each other, and their mutual rights, duties and obligations, as then existing or as might thereafter be created by law. So independent of the contract, after the extension of the city limits, it became the legal duty of the company to furnish the hospital with water in the same manner and for the same rates that it furnished it to other persons within the extension. That duty was as obligatory as if a provision to that effect had been inserted into the contract itself. Such is the holding, as I understand it, of the authorities cited in the majority opinion.

Under that view of the case, the water contract, by agreement of parties, terminated and ceased to be binding and operative upon the extension of the city limits, embracing the hospital; otherwise, we must conclude and hold that at the time the contract was entered into, it was the intention of the parties that the State through said board of managers impliedly waived this valuable right to demand and receive water from the company just as other consumers had the right to do. In other words, counsel for the company contend, in effect, that after the extension of the city limits, it was under a two-fold duty, separate and independent of each other, to furnish water to the hospital, namely, a legal duty

State ex rel. v. Robinson.

and a contractual duty; yet had the hospital insisted, at that time, or even now, should it insist upon the company performing its legal duty by laying mains, pipes, etc., as provided for by its charter, and to furnish water through same to it, the latter would be the first one to protest and insist that such a demand was unreasonable, unjust and oppressive, notwithstanding the fact the company is still furnishing water through the mains laid under the contract, which has long since expired, and still located upon what it designates as private property, but in fact public property—the grounds of the institution.

In my opinion such a demand of the hospital would be unreasonable, unjust and oppressive, for the reason that it was clearly the intention of the parties that, when the city limits were extended so as to include the Hospital, the company should continue to furnish water through those mains, not in the performance of its contractual duties to the hospital, but in the performance of its legal duty. Otherwise, the board of managers could have the mains removed from the grounds and compel the company to lay others, under its charter obligations, which was never contemplated by either party, but both understood that as soon as the extension should be made the contract was to cease and the legal duty of the company to furnish water was to begin.

For these reasons I dissent.

THE STATE ex rel. STEPHEN C. WOODSON v.
HARRIS ROBINSON, Judge of Circuit Court, and
FRANCIS E. PARKER.

In Banc, February 26, 1917.

1. **ELECTION CONTEST:** Jurisdiction: Waiver. Jurisdiction of the subject-matter cannot be waived; and the circuit court does not obtain jurisdiction of an election contest unless notice is served upon contestee within the time prescribed by the statute. The contestee does not waive notice or confer jurisdiction on the court

State ex rel. v. Robinson.

to try the contest, by duly and specifically challenging the jurisdiction and power of the court to proceed with the contest under an alleged notice, or by thereafter filing a counter notice of a contest of his own after the time for serving notice on him has expired.

2. ———: ———: **Service of Notice: Must be by Officer.** Notice in an election contest operates in the nature of a petition and writ in an ordinary civil action, and can be served only by the officer of the court wherein the contest is instituted. It cannot be served, any more than can a summons in an ordinary civil action, by some private person or by contestant himself. The circuit court does not obtain jurisdiction to try an election contest upon a notice served by a private person.
3. ———: **Interlocutory Notices: Service by Private Person.** Section 1791, Revised Statutes 1909, declaring that "service of any notice required by this chapter may be made by any sheriff, marshal or constable, or by any person who would be a competent witness," does not refer to the notice or summons which brings a party into court for the purpose of forcing him to submit to a trial, such as a defendant in an ordinary civil action or a contestee in an election contest, but refers only to interlocutory notices, that is, notices required to be given in the progress of a cause.
4. ———: ———: **Posting Notice in Clerk's Office.** The failure of a private person to find contestee in an election contest will not suffice as a basis for a substituted service until the effort to get personal service has failed, and that effort must be made by an officer of the court, and cannot be made by a private person; and a posting of the notice in the office of the circuit clerk, after unavailing efforts by a private person to obtain personal service, does not bring contestee into court, and gives the court no jurisdiction to try the case.

Prohibition.

WRIT ISSUED.

H. S. Julian, E. H. Wright, T. A. J. Mastin, A. L. Cooper and J. G. L. Harvey for relator.

(1) The requirements of the statute as to notice are jurisdictional and must be complied with. Election contest proceedings are everywhere regarded and treated as special statutory proceedings. *State ex rel. v. Hough*, 193 Mo. 643. They are not civil suits. *Castello v. Court*, 28 Mo. 277; *State ex rel. v. Spencer*, 166 Mo. 279; *State ex rel. v. Hough*, 193 Mo. 643. The courts

State ex rel. v. Robinson.

inherently possess no jurisdiction of election contests and where the statutes confer such jurisdiction upon the courts, they possess jurisdiction only as defined and limited by statute. Said jurisdiction is not general, but is special and restricted. 15 Cyc. 394. Accordingly it is uniformly held that in election contests statutory provisions in relation to time of notice are mandatory requirements, compliance with which is essential to the court's jurisdiction, and that if notice has not been given as required by statute the court has no jurisdiction, and must dismiss the proceedings. *Castello v. Court*, 28 Mo. 259; *Wilson v. Lucas*, 43 Mo. 290; *Bowen v. Hixon*, 45 Mo. 340; *Higbee v. Ellison*, 92 Mo. 13; *Montgomery v. Dormer*, 181 Mo. 5; 7 Ency. Pl. & Pr., 390; 15 Cyc. 400. (2) The statutory requirement that the notice be served within a prescribed time is not in the nature of a statute of limitations, for the reason that the requirement does not affect merely the remedy, that is to say the manner of enforcing a legal right, but the requirement is a part of the right itself which the statute creates and makes conditional, the condition being that the notice be served within the specified time. And, therefore, the right does not exist unless the condition is performed. A mere limitation is a defense to be taken advantage of, or not, as the defendant may please, but where a statute creates a new right and makes the right depend upon the performance of a condition, performance of the condition is the basis of the right and a plaintiff, who asserts the right, must both allege and prove performance of the condition. *Barker v. Railroad*, 91 Mo. 86; *McIntosh v. Railroad*, 103 Mo. 131; *Matthieson v. Railroad*, 219 Mo. 549; *Chandler v. Railroad*, 251 Mo. 600. (3) A notice of contest, therefore, must show on its face when the official count of votes was completed in order that it may appear whether service of the notice was made within the statutory period. *Crisler v. Morrison*, 57 Miss. 791. (4) The attempted service of process was void and of no effect, for the reason that the party attempting to make service was not an officer and there is no authority in law for

anyone who is not an officer to serve original process. *Ross v. Fuller*, 12 Vt. 265. Where you have constructive or substituted service the statute must be strictly and accurately followed. The contestant alone was empowered to post up the notice. The statute does not allow or permit it to be done by an agent, servant or by an attorney. Sec. 5924, R. S. 1909; *Myers v. McRay*, 114 Mo. 382; *Quigley v. Bank*, 80 Mo. 289; *Charles v. Morrow*, 99 Mo. 638; *Bank v. Suman*, 79 Mo. 531; *Steward v. Stringer*, 41 Mo. 400. Where the statute specifically prescribes the character and manner of service, it is strictly construed. *Hyde v. Goldsby*, 25 Mo. 34; *Charless v. Mornig*, 1 Mo. 537; *Bland v. Jameson*, 3 Mo. 52; *Smith v. Rawlins*, 25 Mo. 408; *St. Louis v. Goebel*, 32 Mo. 259; *Huett v. Weatherby*, 57 Mo. 376. (5) The notice of contest should be quashed because it fails to specify the grounds upon which contestant intends to rely, and though it attacks the qualifications of many voters it fails to state any of their names and the objections to them. It has been held that the statute relating to contested elections is a code unto itself, and that the code of civil procedure does not apply. *State ex rel. v. Spencer*, 166 Mo. 279; *State ex rel. v. Hough*, 193 Mo. 615. (6) Contestee neither did nor could waive these jurisdictional objections by filing his counter notice of contest. *Keller v. Chapman*, 34 Cal. 640; *State ex rel. v. Spencer*, 166 Mo. 286.

J. M. Johnson, Park & Brown, George A. Neal and Clinton A. Welsh for respondents.

(1) The circuit court of Jackson County has jurisdiction of the subject-matter of an election contest for the office of judge of the county court of Jackson County. Sec. 5924, R. S. 1909; *State ex rel. v. Hough*, 193 Mo. 651. (2) Notice of contest was given by respondent Parker within twenty days after the votes had been officially counted. Secs. 5924, 6150, R. S. 1909; *Bowen v. Hixon*, 45 Mo. 340; 3 Cyc. 408; *Barnes v. Gottschalk*, 3 Mo. App. 120. (3) The notice of contest designated and specified the proper term of court. Secs. 5924,

5928, R. S. 1909; State ex rel. v. Evans, 184 Mo. 632; State ex rel. v. Hough, 193 Mo. 647. (4) By filing motions in the nature of a demurrer and especially by filing counter notice of contest and cross charges in the nature of an answer and cross petition, petitioner waived any insufficiency of the notice in point of time or manner of service to give the court jurisdiction over his person. In re Ford, 157 Mo. App. 156; Thomasson v. Insurance Co., 217 Mo. 485; State ex rel. v. Oliver, 163 Mo. 679; 3 Cyc. 504; Bankers Life Assn. v. Shelton, 94 Mo. App. 634; 1 Corpus Juris, 37, 42; State v. Rombauer, 140 Mo. 121; Rippstein v. Insurance Co., 57 Mo. 86; Bank v. Griffith, 192 Mo. App. 452; State ex rel. v. Spencer, 164 Mo. 48; State ex rel. v. McElhinney, 199 Mo. 67. (5) The notice of contest states good and sufficient grounds for contest under the statutes and decisions of this court. Moffatt v. Montgomery, 68 Mo. 162; Gumm v. Hubbard, 97 Mo. 311; Sone v. Williams, 130 Mo. 530; State ex rel. v. Evans, 184 Mo. 632.

GRAVES, C. J.—This is an original action in prohibition. At the November election, 1916, the relator, Stephen C. Woodson, and the respondent, Francis E. Parker, were opposing candidates for the office of county judge of the western district of Jackson County, Missouri. This district was co-extensive with the municipality of Kansas City, Missouri, and therefore the Board of Election Commissioners of said city had full control of the returns from such election for said office. In the brief it is stated that Woodson received some 3000 more votes than his opponent Parker, but for the question involved herein this is not a material fact. It would only bear upon the good faith of the contest, a matter urged, but which we deem immaterial. Respondent's brief denies a majority so large, and avers such majority to be 700. Suffice it to say that Woodson got the certificate of election, and Parker has attempted to contest his election. The respondent Judge Robinson had fully indicated his purpose of proceeding with the contest case, when relator Woodson applied here for our

writ of prohibition. In due course our preliminary rule in prohibition was granted and to this rule return was duly made by respondent. Later we permitted an amendment, and this was met by subsequent return. The facts stated in the return were met by proper reply, and counsel for both parties, with commendable promptness, have agreed upon the exact facts of the case. The stipulated facts are:

"It is hereby stipulated and agreed by and between petitioner and respondents in the above entitled cause, through their respective attorneys, that the following may be taken and considered by this court as a statement of facts in this controversy:

"This is a contest over the office of Judge of the County Court of Jackson County, Missouri, for the western district of said county. The boundaries of said district within which candidates for said office are voted for are co-extensive with the corporate limits of the city of Kansas City, Missouri. Petitioner Woodson was the Democratic candidate and respondent Parker the Republican candidate for said office at the general election held on November 7, 1916.

"The judges and clerks of election for each precinct in the various wards within said city counted the votes cast at said election on November 7, 1916, at the close of the polls and filled out a sheet known as the 'Tally Sheet,' which sheet showed the total votes counted by said judges and clerks for each candidate in the respective precincts of the various wards in said city. This tally sheet and other records were delivered to the election commissioners by said judges and clerks on November 7th and 8th, 1916. The Board of Election Commissioners of said city, pursuant to the provisions of section 6149, Revised Statutes 1909, began to make their canvass of said returns. First, they took the tally sheets as returned to them by said judges and clerks and called the totals as shown on said tally sheets to clerks in the office. The said clerks were furnished with large sheets of paper containing in proper columns the names of each person running for office and a column for the

State ex rel. v. Robinson.

votes of each candidate for each precinct in said city. When the totals of the precincts were called from the tally sheets, the clerks placed the number so called in the proper column until all the precincts of a ward were recorded. Then the totals of the precincts so recorded were footed up, showing the total of each candidate for the entire ward. The total votes of the wards were footed up as above, and marked down in pencil on Saturday morning, November 11, 1916. On Saturday, November 11, 1916, the election commissioners opened the envelopes containing the absentee votes pursuant to Session Laws of 1913, page 323, and added the absentee votes of each precinct to the total vote of the precinct as copied from the tally sheet as above. Then the grand total of votes counted for each candidate in each ward was ascertained by adding the total of the precincts as shown by the tally sheet to the absentee vote. The grand total of the votes for each ward was so named and entered of record in lead pencil on November 12, 1916. On Monday, November 13, 1916, the total of the votes of the candidates by wards which had theretofore been entered in pencil were changed in red ink by said clerks. On said Monday, November 13, 1916, the work of recapitulating the votes and arriving at the grand total of votes cast for the different candidates in the entire city of Kansas City was begun, and said totals were completed and the grand total of votes for each candidate in the entire city arrived at on Tuesday, November 14, 1916. On said 14th day of November, 1916, the Board of Election Commissioners executed and entered of record a certificate in the following words:

“ ‘Office of Board of Election Commissioners of Kansas City, Missouri.

“ ‘To the County Court of Jackson County, Missouri.

“ ‘We hereby certify that the Board of Election Commissioners of Kansas City, Missouri, has canvassed the returns of the general election held within the boundaries of Kansas City, Missouri, on the 7th day of November, 1916, and do now certify that the above

State ex rel. v. Robinson.

and foregoing is a full, true, competent and correct statement of all the votes cast at said election in the various precincts and wards of said city for the various candidates above set forth and specified.

“‘IN TESTIMONY WHEREOF the Board of Election Commissioners of Kansas City, Missouri, has caused this certificate to be signed by its chairman and secretary respectively, and the seal of its office to be hereunto affixed this 14th day of November, A. D. 1916.

“‘RUSH C. LAKE,
Secretary

SAM SPARROW,
Chairman (Seal),

Board of Election
Commissioners.

JOHN P. MULLANE,
B. W. WELCH.’

“On November 15, 1916, said Board of Election Commissioners caused all of said sheets and records to be delivered to the County Clerk of Jackson County, Missouri, and thereafter the Clerk of the County Court of Jackson County issued petitioner Woodson a certificate of election as required by the statutes of Missouri.

“On December 4, 1916, respondent Parker served notice of contest upon petitioner Woodson, which notice is attached to and made a part of the petition for writ of prohibition.

“On December 23, 1916, petitioner Woodson served upon respondent Parker a counter notice of contest, which said counter notice is attached to and made a part of return of respondents.

“This agreed statement of facts is made and entered into subject to all objections by either party as to the relevancy of said facts, and it is agreed that by making this agreed statement of facts neither party waives any point made by him in his petition or return.”

Later a supplemental stipulation covering one point was made thus:

“Supplemental Stipulation.

“It is further stipulated and agreed by and between the petitioner and respondent by their attorneys, that the following returns were made upon the notice of contest herein served upon Petitioner Woodson.

State ex rel. v. Robinson.

“ ‘State of Missouri, County of Jackson, ss.

“ ‘Jno. J. Kinney, of lawful age, being first duly sworn upon his oath, states upon this 4th day of December, 1916, he received the attached notice of contest and that for the purpose and with intent of serving the same in accordance with the provisions of law, he made careful and diligent search for the within named Stephen C. Woodson by visiting the county court house at Kansas City, Missouri, the court house at Independence, Missouri, 3651 Campbell Street, Kansas City, Jackson County, Missouri, same being the usual place of abode of Stephen C. Woodson, in Jackson County, Missouri, and also made careful and diligent search for said Stephen C. Woodson in all other places where he might usually be found in Kansas City, Jackson County, Missouri; that he visited the residence at 3651 Campbell Street, Kansas City, Jackson County, Missouri, same being the usual place of abode of said Stephen C. Woodson, and made careful and diligent search and inquiry for some member of the family of said Stephen C. Woodson over the age of fifteen years; that although such careful and diligent search and inquiry was made by affiant, neither the said Stephen C. Woodson nor any member of his family over the age of fifteen years could be found in Jackson County on said 4th day of December, 1916; that thereupon he posted the attached notice of contest in the office of the Clerk of the Circuit Court of Jackson County, Missouri, this 4th day of December, 1916.

“ ‘JOHN J. KINNEY.

“ ‘Subscribed and sworn to before me this 4th day of December, 1916.

“ ‘FLORENCE WILLIAMS,

“ ‘Notary Public within and for Jackson County, Missouri.

“ ‘My Commission expires November 18, 1920.

“ ‘State of Missouri, County of Jackson, ss.

“ ‘W. L. Dannahower, of lawful age, being first duly sworn, upon his oath states that he served the attached notice of contest by delivering a copy thereof to

State ex rel. v. Robinson.

the therein named Stephen C. Woodson, contestee, on December 5, 1916, at about 8:30 o'clock P. M., at 3651 Campbell Street in Kansas City, Jackson County, Missouri.

“ ‘W. L. DANNAHOWER.

“ ‘Subscribed and sworn to before me this 11th day of December, 1916.

“ ‘J. M. O’BLINIS,

“ ‘Notary Public in and for Jackson County, Missouri.

“ ‘My commission expires August 21, 1920.’

“ ‘This supplemental stipulation is made with the understanding that the same is subject to objection by either party as to the competency or relevancy of the facts stated herein.’ ”

By motion to quash the notice of contest, relator Woodson challenged the jurisdiction of the court to try the case. This motion was overruled, and as indicated above the respondent Robinson was proceeding with the case, when stopped by our preliminary rule.

The points made are that the notice of contest was not given in time, and that no valid service of the alleged notice has been had upon relator and therefore the court was without jurisdiction. Respondent denies this, and in addition urges a waiver of jurisdiction. Under the agreed facts the whole question becomes one of law, rather than of fact. Further details as to pleadings and facts can best be noted in connection with the points made. This outlines the case.

I. We are confronted at the outset with the question of jurisdiction of a court in a contest case, and the further question as to whether or not such jurisdiction can be waived. In this case the relator Woodson, after duly and specially challenging the jurisdiction and power of respondent Robinson to proceed with such contest under the alleged notice, did file a counter notice of contest, and this with the motions theretofore filed, are urged as a waiver of jurisdiction. In other words, it is contended that the circuit court,

over which respondent Robinson presided, had jurisdiction of the subject-matter, and this filing of the counter notice thus completed the jurisdiction.

The error in this position lies in the fact, that if the notice by contestant was not given in time or was not validly served the court never acquired any jurisdiction of the subject-matter, and jurisdiction of this kind cannot be waived.

It requires no citation of authorities that jurisdiction of the subject-matter is not waived by any act of the party. He can waive jurisdiction of the person, but not of the subject-matter. If the notice was not legally served in time to give the court jurisdiction of the particular case, no act of the party defendant gives such court jurisdiction. Contested election proceedings are special statutory proceedings; and the court is without jurisdiction until it is made to appear that the requisite notice was legally served within the requisite time. In 15 Cyc. 399 et seq., the rule, which is drawn largely from Missouri cases, is thus stated:

“The intention of the contested election laws is to furnish a summary remedy and to secure a speedy trial, that the title to the office in dispute may be determined before the official term expires in whole or in large part, and that the will of the people may not be defeated in the choice of their officers. Consequently the statutes generally provide that any one desiring to contest an election must file a notice and statement of the grounds of contest within a certain number of days after the election, or the official declaration of the result. These statutes are mandatory and a strict compliance with them is jurisdictional. The notice and statement required to be served by the contestant on the contestee constitute the predicate upon which the power of the court is set in motion, and unless served within the time required by the statute the court has no jurisdiction to hear and determine the contest.”

This has been the Missouri rule since the early case of *Castello v. St. Louis Circuit Court*, 28 Mo. 259. Other

Missouri cases are *Wilson v. Lucas*, 43 Mo. 290; *Bowen v. Hixon*, 45 Mo. 340; *Higbee v. Ellison*, 92 Mo. 13.

It is sufficient to say that the learned author in 15 Cyc., supra, practically uses the language of this court in the formation of the rule which we have quoted. If the respondent in this case never acquired jurisdiction of the subject-matter, as he would not, if notice has not been legally served within time, there is nothing in the point of waiver.

II. Another preliminary question of vital importance is the question as to who shall serve notice of contest. From the record the notice in this case does not appear to have been served by an officer of the court. The question is, can a contestant in person, or through some other private person, serve such notice and make proof of service by affidavit, as was done in this case. The law, section 5924, Revised Statutes 1909, provides: "but no election of any such school director, of any county, municipal or township officer, shall be contested unless notice of such contest be given to the opposite party within twenty days after the votes shall have been officially counted."

The statute uses the term, "notice," but some light is thrown on the character of this document, by a further provision of the same section of the statute. Such provision reads:

"The notice shall specify the grounds upon which the contestant intends to rely, and if any objection be made to the qualifications of any voter, the names of such voters and the objections shall be stated therein, and the notice shall be served fifteen days before the terms of court at which the election shall be contested, by delivering a copy thereof to the contestee, or by leaving such copy at his usual place of abode, with some member of his family over the age of fifteen years; or, if neither such contestee nor his family can be found in the country, and service cannot therefore be had as aforesaid, it shall be a sufficient service of such notice for the contestant to post up a copy thereof in the office

of the clerk of the court wherein the contest is to be heard."

From this it appears that this notice takes the place of a petition in an ordinary law suit. The statutory contents so indicate. But we are not without authority on the question. In a splendidly written opinion in the case of *Hale v. Stimson*, 198 Mo. l. c. 145, LAMM, J., said:

"Under our method of contesting elections, the notice of contest takes the place of a petition in an ordinary suit, and *the service of this notice upon contestee fills the office of a summons.* . . . [State ex rel. Wells v. Hough, 193 Mo. 615.] The notice of contest therefore, must be judged of by the rules pertaining to the sufficiency of a petition, and, hence, must state a cause of action to give the court jurisdiction, or in order that a recount of votes may be legally made." The italics are ours.

This Hale-Stimson case was one thoroughly threshed out in this court. It came to Court in Banc on an opinion adverse to the one now printed in the books. We only mention this to show the consideration that the case had before the present opinion was made the united voice of the Court in Banc. Those of us now remaining from that date to this (and there is but one) can well recall the circumstances. The desire and purpose was to fix principles in these cases. One of the things we did settle was, that the notice in contested election cases served as and for the petition, and the service of this notice served as and for the summons in such cases. We had held in previous cases that the notice if served in time to confer jurisdiction, could be amended just as a petition could be amended. [State ex rel. v. Smith, 104 Mo. l. c. 667; Nash v. Craig, 134 Mo. l. c. 353, 354.] In the Craig case it was said:

"While the statutes expressly provide that no formal pleading shall be required in cases of contested elections, yet it has been held that 'this notice is the initiatory step in the contest and operates in the nature of a petition and writ in an ordinary civil action.' [State ex

rel v. Smith, 104 Mo. l. c. 667.] Again it is said: 'The notices, on the one side and the other, constitute the only pleadings.' [Gumm v. Hubbard, 97 Mo. 318.]" Again the italics are ours.

It is clear from our rulings that the service of this notice and the notice itself, are something more than the ordinary. It is the thing which brings the opposite party into a court of justice. We do not believe that the statute contemplates the service of such a notice other than by an officer of the law. It should be added that the very service which is required to be made is the service which the statute requires an officer to make upon a petition and summons. Note the language of the statute as to how service shall be made: "by delivering a copy thereof to the contestee, or by leaving such copy at his usual place of abode, with some member of his family over the age of fifteen years." The identical language for the service of a summons. But this may not enlighten us much because we have statutory provision for the service of notice in like manner, Revised Statutes 1909, section 1788.

We are cited to this section and section 1791, as authority for private persons serving the notice in this case. The two sections read:

"Sec. 1788. Notices shall be in writing, and shall be served on the party, or his attorney, in the manner prescribed in this article, unless otherwise provided by law. The service may be made by delivering to the party, or his attorney, a copy of such notice, or by leaving a copy at the usual place of abode of the party, or his attorney, with some person over the age of fifteen years, or with the clerk of the party or his attorney."

"Sec. 1791. The service of any notice required by this chapter may be made by any sheriff, marshal or constable, or by any person who would be a competent witness, who shall make affidavit to such service; and any such officer shall be bound to serve notices equally with summons or other writs, and shall be in like manner liable for neglect."

We should for a proper discussion add section 1789, which reads:

"Sec. 1789. If neither the adverse party nor his attorney reside in this State, such notice may be put up in the office of the clerk of the court wherein the suit is pending or the proceedings are intended to be had."

Counsel for respondent urge these provisions of our statute, and make light of the proposition here involved, but they entirely overlook the fact that this court has specifically ruled that the notices in these statutes provided for have no reference to a notice which brings the party into court for the first time, but only have reference to such notices as may have to be served after the party is in court. In *Wilson v. Railway Co.*, 108 Mo. l. c. 594, *SHERWOOD, P. J.*, said:

"It is claimed, in support of the validity of the execution sale, that the service of the notice and motion, though made in the State of New York, and upon persons there resident and never resident in this State, was legal, and gave the circuit court jurisdiction to award the execution.

"Section 736, Revised Statutes 1879, provides: 'If any execution shall have been issued against any corporation, and there cannot be found any property or effects whereon to levy the same, then such execution may be issued against any of the stockholders to the extent of the amount of the unpaid balance of such stock by him or her owned; provided always, that no execution shall issue against any stockholder, except upon an order of the court in which the action, suit or other proceeding shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the person sought to be charged; and upon such motion such court may order execution to issue accordingly; and provided, further, that no stockholder shall be individually liable in any amount over and above the amount of stock owned.'

"It is insisted that such service may be had as provided in section 3505, Revised Statutes 1879, which reads this way: 'Notices shall be in writing, and shall

be served on the party or his attorney, in the manner prescribed in this article, unless otherwise provided by law. The service may be made by delivering to the party or his attorney a copy of such notice, or by leaving a copy at the usual place of abode of the party or his attorney, with some person over the age of fifteen years, or with the clerk of the party or his attorney.' The next succeeding section (3506) provides: 'If neither the adverse party nor his attorney reside in this State, such notice may be put up in the office of the clerk of the court wherein the suit is pending or the proceedings are intended to be had.'

"It is plain, from these statutory provisions, that they refer, as their terms would naturally import, to a suit then pending in a court which has already acquired jurisdiction of the party to be served with the notice; for the party thus intended to be served is spoken of in section 3506 as 'the adverse party,' and as having an 'attorney,' meaning an attorney of record. This language would obviously be without meaning where as yet there is neither litigation nor adverse parties, and, consequently, no attorneys of record, on whom notice could be served. Thus it will readily be seen that, if the plaintiff's contention be correct, that this statute applies to the service of a notice in an instance like the present, then a service of such a notice would be equally good as to non-residents, were it simply posted up in the clerk's office as provided in section 3506. In fact, in case of a non-resident party with a non-resident attorney, this would be the only method.

"In the same chapter 21 where section 736 is found, section 751 occurs, which provides that "all notices, orders and rules required to be served in the progress of any cause shall be served in like manner as in other civil cases.' This section evidently refers also to interlocutory notices, etc.,—those 'required in the progress of any cause,'—and not to those notices, etc., by which the action is begun."

The sections which Judge SHERWOOD discusses are the same cited to us by learned counsel for respondent, and they have remained unchanged from that day forward. Our holding in the Wilson case, *supra*, was that the notices in these several sections mentioned had no reference to a notice to bring a person into court for the purpose of forcing him to try a case in court. These statutes therefore are inapplicable and furnish us no light upon the question under consideration. The notice we have under consideration is the very foundation of the action, and its service is the process by which the party is brought into court. The statute provides that the contestee shall be served with notice. The sections referred to by Judge SHERWOOD, and relied upon by respondent, do not aid us, because they have no reference to initial process in law suits. We have held that this notice in election contests is the initial process. The question then is by whom it can be served, absent a statutory provision, as in this case. In other words, what was the legislative intent, when it provided for service of this initial process in a case of this character? Did the Legislature intend that such process (notice as stated in the law) should be served by a private individual? We think not. We believe that the Legislature by the language used contemplated the service by an officer of the court wherein the action was to be heard. This, for the reason that the very jurisdiction of the court was and is dependent upon the service. The Legislature hardly intended that the court should determine its jurisdiction from the affidavit of a private party, rather than from the return of its own bonded officer. We conclude that the Legislature intended by this statute that this initial process should be served by the official process-server of the court, rather than a private individual. The initial process in all election contest cases is the notice and the service thereof.

III. If we are right in our conclusion in paragraph two *supra*, there has been no notice to contestee by personal service. Service in a method unauthorized by law

is no service. Through personal service there has been no notice of contest to this date. Is there substance in the alleged substituted service by the alleged posting of the notice of contest in the clerk's office? The statute says that this kind of service shall be by posting a copy of the notice in the clerk's office. The return says that the affiant posted the notice itself (not a copy), and just how the court was to become possessed of this original notice after the posting in the clerk's office is an interesting matter for thought. But to get to the more serious trouble. This substituted service could not be had until effort to get personal service had failed, and this effort to get personal service, as we have indicated above, must be by the sheriff or other proper officer of the court. If we are right in holding that personal service must be through an officer of the court, then there can be no substituted service until this officer fails to find the contestee. The failure of a private person to find him will not suffice for the basis of the substituted service. Whilst the statute says the contestant shall post up the copy, yet we think that the reasonable construction of the statute would be that the officer charged with the service of the notice would be the party to post the notice, after having made the effort for personal service, and let his return show the service in that way. It at least does not mean that some private party, as here, can make the search, and then post the notice.

Under the record before the respondent Robinson, and before us, he had no jurisdiction in this case, and our preliminary rule in prohibition should be made absolute. With these insurmountable obstacles in the way of jurisdiction, it would be useless to discuss other questions urged in the briefs. Let our preliminary rule be made absolute. It is so ordered.

All concur, except *Woodson, J.*, not sitting.

State ex rel. v. Jones.

THE STATE ex rel. ST. JOSEPH LEAD COMPANY
v. WILLIAM T. JONES, Judge of Circuit Court,
and WILLIAM R. RAMSEY.

In Banc, February 26, 1917.

1. **VENUE: Foreign Corporation.** An action by summons against a foreign business corporation, duly licensed to do business in this State cannot be instituted in any county other than the county in which either the cause of action accrued or in which the corporation has and usually keeps an office or agent for the transaction of its usual and customary business. If the cause of action accrued in St. Francois County, and the defendant is a New York corporation licensed to do business in this State and maintains an office and agent for the transaction of its usual and customary business in Jefferson County, but has no such office or agent in the city of St. Louis, the suit by a citizen of Illinois cannot be maintained in said city. The word "corporations" used in Sec. 1754, R. S. 1909, comprehends foreign as well as domestic corporations.
2. **STATUTORY CONSTRUCTION: Inclusion of Things Existent and Subsequent: Corporations.** A statute general in terms may be made to apply to conditions non-existent at the time of its enactment. If expressed in words of the present tense it will generally be construed to apply not only to things and conditions existing at its passage, but will also be given a prospective interpretation and applied to such as come into existence thereafter. Sec. 1754, R. S. 1909, stating the venue of suits against corporations, embraces foreign corporations, even though it be admitted that they could not have been served with process in this State at the time of its enactment in 1855.
3. **VENUE: Foreign Corporation: Governed by Section 1754; Non-Resident.** The venue of a suit against a foreign industrial corporation licensed to do business in this State is governed by section 1754, Revised Statutes 1909, and therefore it is not necessary or proper to construe the term "non-residents" used in the fourth subdivision of section 1751. [Distinguishing *Stone v. Insurance Co.*, 78 Mo. 655, and *N. Y., L. E. & W. Railroad Co. v. Estill*, 147 U. S. 591.]

Prohibition.

WRIT ISSUED.

Politte Elvins and Nagel & Kirby for relator.

(1) Suit against a foreign corporation which keeps in this State an office or agent for the transaction of its usual business, must be brought either in the county where the cause of action accrued or in the county where it keeps such office or agent. Sec. 1754, R. S. 1909. "Except as otherwise provided by law" non-residents may be sued in any county under section 1751. But, even if a foreign corporation maintaining an office and agent in this State is to be considered a "non-resident" under section 1751, it is "otherwise provided" by section 1754 that such corporation shall be sued in the county where the cause of action accrued or the county where such office or agent is kept. (2) A foreign corporation complying with our laws and maintaining an office and agent for the transaction of its business in this State is regarded, for purposes of jurisdiction, not as a non-resident, but as a resident of the county where such office or agent is maintained. *Harding v. Railroad*, 80 Mo. 661; *Fitzmaurice v. Turney*, 214 Mo. 627; *Sidway v. Land Co.*, 187 Mo. 673; *Young v. Niles & Scott Co.*, 122 Mo. App. 329. (3) The exceptional case of foreign insurance companies, which are held to be residents of and suable in any county in the State by virtue of the specific provisions of section 7042, proves the rule for which we contend. *Meyer v. Insurance Co.*, 184 Mo. 486; *State ex rel. v. Grimm*, 239 Mo. 166; *Spangler v. Protective Assn.*, 172 Mo. App. 255; *Rodgers v. National Council*, 172 Mo. App. 719.

Safford & Marsalek for respondents.

(1) Suits against non-residents may be brought in any county in the State. Sec. 1751, R. S. 1909; *Baisley v. Baisley*, 113 Mo. 549; *Greeley v. Railroad*, 123 Mo. 157; *Gabriel v. Mullen*, 111 Mo. 119; *Accident Co. v. Reisinger*, 43 Mo. App. 576. (2) The fact that a foreign corporation is licensed to do business in a State other than that of its incorporation does not domesticate

it. It is a non-resident of every State except that which granted its charter. Constitution, art. 2, sec. 10; Secs. 1751, 1754, R. S. 1909; Herryford v. Ins. Co., 42 Mo. 148; Stanley v. Railroad, 62 Mo. 511; Spangler v. Protective Assn., 172 Mo. App. 255; Middough v. Railroad, 51 Mo. 520; Stone v. Ins. Co., 78 Mo. 655; State ex rel. v. Mason, 153 Mo. 23; 2 Cook on Corporations (4 Ed.), sec. 757; 5 Thompson on Corporations (2 Ed.), secs. 6629-6630; Ex parte Schollenberger, 96 U. S. 377; Railroad Co. v. Harris, 12 Wall. 65, 79 U. S. 354; Railroad v. Estill, 147 U. S. 593; Thomas v. Mining Co., 65 Cal. 600; Ivanuch v. Railroad, 128 N. W. 333; Railroad v. Allison, 190 U. S. 236. (3) In 1855, when Sec. 1754, R. S. 1909, was enacted, a foreign corporation could not be brought into court by summons, but only by attachment. McNichols v. Agency Co., 74 Mo. 457; Hill v. Mfg. Co., 4 Mo. App. 595; Gold Issue M. & M. Co. v. Ins Co., 184 S. W. 1003; Farnsworth v. Railroad, 29 Mo. 75.

WILLIAMS, J.—This is an original proceeding whereby relator seeks to prohibit respondents from proceeding with a case now pending before Hon. William T. Jones, Judge of Division One of the circuit court of the city of St. Louis, wherein William R. Ramsey as plaintiff (one of the respondents herein) seeks to recover from the St. Joseph Lead Company as defendant (relator herein), the sum of \$25,000 for injuries alleged by plaintiff to have been by him received through the negligence of the defendant while working in the employ of the defendant in St. Francois County, Missouri.

To the relator's petition respondents demur on the ground that the petition and writ do not state facts sufficient to constitute a cause of action.

The facts stated in the petition and thus admitted by the demurrer are substantially as follows:

Suit was instituted, as above mentioned, in the circuit court of the city of St. Louis, by William R. Ramsey, a resident of the State of Illinois, against the St. Joseph Lead Company. The cause of action upon which

suit was brought did not accrue in the city of St. Louis, but in the county of St. Francois. The defendant, St. Joseph Lead Company, is a corporation organized under the laws of New York and is licensed to do business and is doing business in the State of Missouri and maintains an office and agent for the transaction of its usual and customary business in Jefferson County, Missouri, but has no such office or agent in the city of St. Louis. Summons was issued directed to the sheriff of Jefferson County, who made return showing service upon the defendant in that county.

In due time defendant (relator) appearing specially for that purpose, moved to quash *the summons and return*, on the ground that the suit was not commenced either in the county where the cause of action accrued, or in the county in which the defendant corporation had or usually kept an office or agent for the transaction of its usual and customary business. The respondent, William T. Jones, as judge of said court, entered an order overruling the motion to quash and was about to entertain further proceedings in the case at the time application was made to this court.

I. The question presented is one of *venue* and may be stated as follows:

Can suit by summons be instituted against an ordinary foreign business corporation (duly licensed to do and doing business in this State), in any county in this State other than in the county where either the cause of action accrued or where the corporation has or usually keeps an office or agent for the transaction of its usual and customary business?

Venue:
Foreign
Corporation.

We have reached the conclusion that the above question must be answered in the negative.

Sections 1751 and 1754, Revised Statutes 1909, the only statutes claimed to deal with this subject, are as follows:

Section 1751: "Suits instituted by summons shall, *except as otherwise provided by law*, be brought: First,

when the defendant is a resident of the State, either in the county within which the defendant resides, or in the county within which the plaintiff resides and the defendant may be found; second, when there are several defendants, and they reside in different counties, the suit may be brought in any such county; third, when there are several defendants, some residents and others non-residents of the State, suit may be brought in any county in this State in which any defendant resides; *fourth, when all the defendants are non-residents of the State, suit may be brought in any county in this State;* fifth, any action, local or transitory, in which any county shall be plaintiff, may be commenced and prosecuted to final judgment in the county in which the defendant or defendants reside or in the county suing and where the defendants, or one of them may be found.” (Italics ours.)

The foregoing section, down to subdivision *fifth* thereof, was first enacted in its present form in 1855. [See R. S. 1855, p. 1220.] At that revising session of the Legislature, among other changes made in the then existing statute, the words “except as otherwise provided by law” were first inserted.

Section 1754: “Suits against corporations shall be commenced either in the county where the cause of action accrued, (or in case the corporation defendant is a railroad company owning, controlling or operating a railroad running into or through two or more counties in this State, then in either of such counties), or in any county where such corporations shall have or usually keep an office or agent for the transaction of their usual and customary business.” (Parentheses ours.)

The last above section was also first enacted in 1855 with the portion in parentheses omitted. [See R. S. 1855, p. 377.] The portion in parentheses was inserted by amendment in 1903.

The first point for determination is: Which of the above sections governs the *venue* in suits instituted against foreign corporations of the kind and character of relator?

Relator contends that section 1754 governs, while respondent contends that the fourth subdivision of section 1751 applies.

It will be noticed that section 1751, *supra*, by its express terms, "*except as otherwise provided by law,*" clearly indicates that it was not the legislative intention that said section should prevail over any conflicting statute. In this behalf it is of interest to note that at the same session of the Legislature, to-wit, the revising session of 1855, section 1754 was first enacted providing that *suits against corporations* should be commenced either in the county where the cause of action accrued or in any county where the corporation has an office or agent for the transaction of its usual or customary business.

The term "corporations" used in section 1754, *supra*, unless limited by construction or by other statute, is certainly broad enough to cover all corporations, foreign as well as domestic. In this connection, however, respondents contend that since foreign corporations could not be served with summons in this State at the time section 1754 was enacted, it should not be held to apply to foreign corporations. We are unable to see wherein this argument can, in any manner, aid the respondents, for if it can properly be said that section 1754, *supra*, could not apply because no provision existed at that time for *serving* summons upon foreign corporations in this State, the same would also have to be said with reference to the application of section 1751, *supra*, enacted into its present form (as far as the points here involved are concerned), at the same session and therefore also at a time when no provision existed for *serving* a foreign corporation in this State. If respondents are correct in the principle of law underlying their argument then we would be in a situation *without any provision* for instituting suits by summons against such foreign corporations, because said two sections are the only statutes which can be claimed to provide the venue under the present situation.

Respondent, however, is in error in contending that a statute in general terms can never apply to conditions other than those existing at the time the statute is enacted. The correct rule on this point is stated in 36 Cyc. 1235, as follows: "Where a statute is expressed in general terms and in words of the present tense it will as a general rule be construed to apply not only to things and conditions existing at its passage, but will also be given a prospective interpretation, by which it will apply to such as come into existence thereafter."

To the same effect are 2 Lewis's Sutherland, Statutory Construction (2 Ed.), p. 956; Endlich on the Interpretation of Statutes, sec. 112; State v. Hays, 78 Mo. 600, 1. c. 604.

Since sec. 1754, *supra*, is sufficient in terms to comprehend foreign as well as domestic corporations and since in the light of the foregoing rule, it should be held to spring into use and apply to corporations, upon which provision for serving summons is thereafter made, as well as to corporations which could then be served with summons, it necessarily follows that as to suits against this class of defendants the matter of *venue* was "otherwise provided by law" and that the matter of *venue* as to such defendants falls within the exception, and not the rule, provided by section 1751, and that therefore section 1754 and not section 1751 prescribes the rule on *venue* in suits against such foreign corporations.

II. Learned counsel upon both sides have ably briefed the question concerning the proper construction of the term "non-residents" contained in the fourth subdivision of section 1751, *supra*. This was

Venue: Non-Resident.	done, no doubt, to meet any contingency that might arise. However, in view of the conclusion above reached that section 1754, <i>supra</i> , governs the situation in this case, it would be but to go afield were we to enter into a discussion of what the situation would be if section 1751, <i>supra</i> , governed the case. If section 1751 did govern the case then, of course, it would be necessary to determine, in attempting to ap-
---------------------------------------	--

ply that statute, whether or not the relator was a non-resident within the meaning of the fourth subdivision thereof. But since we have held that that section does not apply it would be *obiter dictum* to undertake to construe its terms. In support of their contention that foreign corporations are non-residents within the meaning of section 1751, the main case cited by respondents is *Stone v. Insurance Co.*, 78 Mo. 655. That case held (whether necessary to a decision of the case or not we need not here determine), that the defendant, a foreign insurance company, was a non-resident within the meaning of section 1751, *supra*. In other words, the decision in that case was based, at least in part, upon the hypothesis that section 1751 governed in that case. Section 1754, *supra*, however, does not appear to have been considered by the court in reaching that hypothesis, at least that section is not mentioned in the opinion. A section relating specifically to insurance companies is mentioned and considered. Whether the court there erred in taking the hypothesis which it did take, we cannot here determine because it would also involve the construction of the statute (relating to foreign insurance companies) not involved in this case, and as above stated such determination would be but an *obiter dictum* in the present case.

The case of *Stone v. Insurance Co.*, *supra*, cannot therefore be considered as an authority upon the exact points held in judgment in the case at bar and the same may also be said with reference to *N. Y., L. E. & W. Railroad Co. v. Estill*, 147 U. S. 591, which follows the *Stone* case and applies the rule therein announced to foreign railroad corporations. The *Estill* case also does not mention section 1754, *supra*. The remarks in this paragraph are made merely in explanation of our failure to undertake to construe section 1751, *supra*.

III. It stands conceded upon this record that the relator (defendant in the suit pending in the circuit

court of St. Louis) did not have or usually keep, in the city of St. Louis, an office or agent for the transaction of their usual and customary business and further that the cause of action sued upon did not accrue in said city.

Facts as to
Residence.

Applying the rule announced in Paragraph One above, it follows that said circuit court is without jurisdiction to proceed with the case and that the preliminary rule of prohibition heretofore issued should be made permanent. It is so ordered. All concur.

E. E. CARSON v. BERTHOLD & JENNINGS LUMBER COMPANY et al., Appellants.

Division One, March 12, 1917.

1. **COUNTY LAND: Ripley County: Sale for Fifty Cents Per Acre.** A sale of swamp land granted by the State to Ripley County in 1857, and conveyed by the county to a private citizen in 1859, was not void for that it was sold for fifty cents per acre, for the Act of January 30, 1857, Laws 1856, p. 464, provided that the minimum price for such lands lying in that county should be fifty cents an acre. [The Act of January 30, 1857, was not considered in Bayless v. Gibbs, 251 Mo. 492, and hence it is not an authority for a contrary ruling, and if it intended to announce a contrary ruling it is disapproved.]
2. ———: ———: **Transfer to Another County.** Swamp land was granted by the State to Ripley County by legislative act dated November 4, 1857, and by that county was patented to a private citizen in 1859. In 1864 the line between Ripley and Butler counties was so changed that the land was thrown into Butler. *Held*, that as the title was transferred by Ripley County prior to the change in the boundary, no title ever vested in Butler County, and defendants acquired no title based on a patent from that county.
3. **CONVEYANCES: Equitable Title: From Husband to Wife: Statute of Uses.** If the estate vested in the wife by a deed directly to her from her husband, made prior to the Married Woman's Act, remained in her until after his death, the Statute of Uses upon his death executed the dry trust, and her deed thereafter conveyed the legal title.

Carson v. Lumber Co.

4. **LACHES: Neglect of Legal Title.** If the owner of a superior title with full knowledge of his rights, neglects to assert or establish them against an adverse claimant in possession, for such a length of time as to afford a presumption that they have been abandoned, or as would prevent the adverse claimant from proving his claim or title, or as would inflict an inequitable injury upon such claimant if he were ousted, then the owner of the superior title will not subsequently be aided by equity to recover the land. But if the delay of the present or previous holders of the paramount title in asserting their rights has not altered the position of the present adverse claimant or those from whom he claims, the land was submerged and not in possession of any one until recent years, the delay has not affected the documentary evidence upon which such claimant relies to show his title, and all that has been done by him has been to erect cheap buildings for the use of employees engaged in cutting timber and tillage, the paramount title has not been defeated by laches.
5. **LIMITATIONS: Pleading.** If there has been adverse possession for a sufficient length of time to create title, the statutes of limitations need not be specially pleaded but may be invoked under a general denial.
6. ———: **Swamp Lands: Sec. 7997.** The purpose of the last proviso to Sec. 7997, R. S. 1909, was to establish title by prescription in patentees of swamp land conveyed by the county court prior to 1880, who had claimed and paid taxes for more than twenty years. The act had no retroactive operation, and did not prejudice the title which had been conveyed by patent by the county to a private citizen prior to its enactment.
7. ———: **Thirty-Year Statute: Payment of Taxes: Alteration of Tax Book: Interpolations.** Documentary evidence, such as a tax book, showing on its face circumstances of suspicion, such as writings over erasures, or the use of different inks, or interpolations, should not be received in evidence without explanation on the part of the party producing it. And that rule applies to an erasure and a change in the description of land on the tax book, where it is attempted thereby to show by the plaintiff that he paid the taxes one year out of the thirty.
8. ———: ———: **Title.** The failure of the owner of the paramount title to pay taxes for thirty-two years will bar him from recovering the land from one who for many years has paid the taxes and has for seven years been in possession and claiming to be the owner under a patent from the county, which did not convey the title because it had been previously conveyed by another county at a time when it was a part of its swamp lands.
9. ———: ———: **Burden of Proof.** The thirty-year Statute of Limitations requires the party invoking it to show non-payment of

taxes by the owner of the paramount title, but the evidence to support that negative is not required to be either other or greater in degree than that which would generate belief in the minds of the triers of the fact.

Appeal from Butler Circuit Court.—*Hon. J. P. Foard*,
Judge.

REVERSED.

N. A. Mozley and *Francis M. Curlee* for appellants.

(1) The patent of Kittrell, Swamp Land Commissioner, under which plaintiff claims, shows on its face that the land was sold at fifty cents per acre, and is, therefore, void. *Bayless v. Gibbs*, 251 Mo. 492. (2) The title to the land, therefore, remained in Butler County, and passed to defendants' grantors by the patent from the Swamp Land Commissioner. (3) Defendants acquired title by the twenty and thirty-year Statutes of Limitations. Secs. 1884, 7997, R. S. 1909; *De Hatre v. Edmonds*, 200 Mo. 246; *Collins v. Pease*, 146 Mo. 135. (4) The payment or non-payment of taxes is proved as a fact, and by the same sort of testimony by which any ordinary fact may be proven. *Rollins v. McIntyre*, 87 Mo. 496; *Campbell v. Greer*, 209 Mo. 199. (5) The plaintiff must himself prove an indefeasible title, and cannot rely on any weakness, if any, in defendants' title. *Wheeler v. Land Co.*, 193 Mo. 279; *Senter v. Lumber Co.*, 255 Mo. 590; *Skillman v. Clardy*, 256 Mo. 297. (6) If plaintiff has any title, it is only an equitable title. His petition declares on an equitable title and he claims through deed of June 1, 1878, from John T. Hodgen directly to the latter's wife Elizabeth D. Hodgen, which deed conveyed no legal title. *Turner v. Shaw*, 96 Mo. 22; *Crawford v. Whitmore*, 120 Mo. 44. (7) Plaintiff is barred of equitable remedy by the laches of himself and grantors. *Shelton v. Horrell*, 232 Mo. 358; *Troll v. St. Louis*, 257 Mo. 660; *Moreman v. Talbott*, 55 Mo. 392; *Landrum v. Bank*, 63 Mo. 48; *Cockrill v. Hutchinson*, 135 Mo. 67; *Sensenderfer v. Smith*, 66 Mo. 80; *Schradski v. Albright*, 93 Mo. 42.

David W. Hill for respondent.

(1) The consideration of fifty cents per acre in the Ripley County patent was authorized by a statute then in force. Laws 1856-57, p. 464. (2) The title to the land in suit never rested in Butler County. Laws 1857, p. 32; *Simpson v. Stoddard Company*, 173 Mo. 421; *French v. Fyan*, 93 U. S. 169. (3) After the land was patented by Ripley County it was located in Butler County by a change of the county line. Laws 1863-64, p. 409. (4) Sec. 7997, R. S. 1909 could not disturb or affect title to this land—could not disturb vested rights. *Telephone Co. v. Telephone Co.*, 236 Mo. 132. (5) Defendants' grantors entered upon the land and cut timber in 1906 and built some shacks for sawmill purposes—defendants attempted to purchase in 1909. Defendants admit that saw-mill shacks did not enhance value of land. Disinterested witness swore cutting timber damaged and did not enhance value of land. Plaintiff brought suit in 1913. Plaintiff's grantors had paid taxes within thirty years, and he is not barred by any statute or laches. *Marshall v. Hill*, 246 Mo. 25. (6) The presumption obtains that the interlineation in the tax book was regularly made. 2 Cyc. 242. The so-called "railroad tax books," introduced by defendants, to prove payment of taxes, were not authorized by law. Secs. 7576, 7551, R. S. 1889; Secs. 6723, 6704, R. S. 1879. (7) The deed to Elizabeth D. Hodgen from her husband conveyed the equitable title, and when he died, or the marriage ceased from any other cause, the legal title was thereupon vested in her, and her deed, as widow, conveyed the absolute title to John M. Hodgen. *Stark v. Kirchengraber*, 186 Mo. 633. (8) Laches, relied upon as an estoppel, must be pleaded, and there is no such plea in this case. *Turner v. Edmonston*, 210 Mo. 428; *Grooms v. Morrison*, 249 Mo. 550.

BOND, P. J. —I. Suit to quiet title and for possession of eighty acres of swamp land. In the first count of his petition plaintiff alleges he is the "equitable owner"

of the land. In the second count he alleges that on the 19th day of June, 1913, he was the owner of the same land and prays ejectment of defendants and damages and monthly profits. The answer of defendants avers that they own the land in fee, and, further, that plaintiff is estopped by laches and barred by the thirty-year Statute of Limitations. Issue was joined by a reply. The case was tried by the court, a jury being waived, and judgment was rendered on the first count of the petition that plaintiff "is the absolute owner in fee simple of the land" in dispute, and on the second count the court found the issues for plaintiff and gave judgment for \$300 damages, \$40 as monthly rents and profits, and for possession of the premises and awarded execution accordingly.

II. The land was granted by the United States to the State of Missouri through an act of Congress, September 28, 1850. This land was situated in Ripley County, Missouri, and the full title thereto was vested in said county by grant from the State through the Act of the General Assembly passed on November 4, 1857. [Laws 1857 (Adj. Ses.), p. 32.] In 1864 the line between Ripley and Butler Counties was altered, whereby the land was thrown into Butler County. The title claimed by plaintiff was derived through mesne conveyances from Isaac N. Hedgepeth, to whom the land was patented by Lemuel Kittrell, Swamp Land Commissioner of Ripley County, on May 20, 1859. The title of the defendants is based upon a patent from the State of Missouri to Butler County, dated February 17, 1870, and recorded March 30, 1870, after which Butler County, by its Swamp Land Commissioner, patented the land to the St. Louis Iron Mountain and Southern Railway Company, duly recorded February 3, 1871, and on May 10, 1901, the said corporation conveyed the land to William M. Barron, by deed recorded June 26, 1901, and the latter conveyed the title to the defendants.

County
Patents.

It is insisted by defendants that inasmuch as the original patent from Ripley County to Isaac N. Hedgepeth shows that the land was sold at fifty cents per acre, such patent was absolutely void under the doctrine of *Bayless v. Gibbs*, 251 Mo. 492. This assignment is not well taken, for it distinctly appears that there was then in force an act of the Legislature, approved January 30, 1857 (Laws 1856, p. 464) which provided that the minimum price for swamp lands lying in Ripley and other counties mentioned, should be fifty cents an acre. This act of the Legislature does not seem to have been repealed in 1859, when the Swamp Land Commissioner of Ripley County conveyed the land in dispute to the first taker in plaintiff's chain of title. Hence the validity of that conveyance is not affected by the ruling in *Bayless v. Gibbs*, *supra*. Moreover, this statute does not seem to have been called to the attention of the court in *Bayless v. Gibbs*, and anything ruled in that case contrary to its provisions is, therefore, disapproved.

Assuming, as we must, under the terms of this statute, that the title of Ripley County was transferred prior to the change of boundary between that county and Butler County, whereby the land was taken into and became a part of the domain of Butler County, it is evident that no title to the land ever vested in Butler County, and hence defendants could not have acquired any title based on a conveyance from it.

III. This leaves for decision only the question as to the nature of the title acquired by plaintiff and whether or not it has been lost by laches or barred by the thirty-year Statute of Limitations.

With reference to the title acquired by plaintiff, appellant makes the point that one of the mesne conveyances upon which it depended was a direct deed from a husband to his wife (Hodgen to Hodgen) executed before the enactment of the Married Women's Statute, and hence under the authority of *Turner v. Shaw*, 96 Mo. 22, and subsequent

**Equitable
Title.**

cases, the grantee only acquired an equitable estate. But an examination of the abstract discloses that the estate thus vested in her remained such until after the death of her husband, and the rule is now established (Stark v. Kirchgraber, 186 Mo. l. c. 642 et seq.) that in such cases the statute of uses executed the dry trust which was in her husband whenever the wife became discovert. Hence the point made by appellant is no longer tenable.

It is further insisted by appellant that respondent is estopped by the laches of his grantor. Waiving for the consideration of this point, whether the pleadings to that effect sufficiently state the equities calling for the application of that rule, we will dispose of the point.

Laches. The basis of the rule estopping one by his own laches or that of persons with whom he stands in privacy, is laid in the equitable maxim that "he who seeks equity must do equity," and hence if the owner of a superior title, with full knowledge of his own rights, neglects to assert or establish them against an adverse claimant in possession of the land, for such a length of time as to afford a presumption that they have been abandoned or would prevent the other party from proving the claim or title, or would inflict an inequitable injury upon him, then the owner of such paramount title loses the aid of equity when he subsequently seeks to recover the land. This doctrine rests purely on equitable principles and may be invoked independently of the lapse of time fixed by the Statutes of Limitation. [Toler v. Edwards, 249 Mo. l. c. 167, and cases cited.] Although the present holder of the title to the property in dispute acquired the same by quit-claim deed from a non-resident whom he succeeded in finding after letters of inquiry, immediately before the institution of the suit, yet we do not discover in the facts shown in the record, that the delay of the previous holders of the title, in the assertion of their rights, has altered the position of the defendants or those from whom their title is deraigned. The land seems to have been prac-

tically submerged until 1906, and not until that time in the actual possession of any one. Defendants acquired their claim of title in 1909, through a chain running back to a conveyance from Butler County in 1870. The delay on the part of the grantors of plaintiff has not affected in any way the documentary evidence upon which defendants rely to show record title, which consists of a series of written conveyances; for the two chains of title rest upon writings which speak for themselves. Hence it cannot be said that defendants have been put to any disadvantage in proving their title. Neither has any inequitable damage been inflicted upon them since the occupancy of the land began and since the possession was taken thereof by defendants in 1909. All that appears to have been done was the erection of convenient and cheap buildings for the use of the employees of defendants engaged in cutting timber from the land and tillage. In these circumstances we are unable to say that the rights of the defendants have been prejudiced by the delay of the previous grantors of plaintiff to assert their title or that defendants have been put to any disadvantage by the death or disappearance of witnesses in making proof of their title.

IV. The decisive question in this case grows out of the defense of the Statute of Limitations. The law is well settled that where that lapse of time has occurred which, by the Statute of Limitations, is fixed for the creation of an estate by adverse possession or undisturbed occupancy, the statutes need not be specially pleaded, but may be relied on under a general denial. [Nelson v. Brodhack, 44 Mo. 596; Collins v. Pease, 146 Mo. 135; DeHatre v. Edmonds, 200 Mo. 1. c. 275, 277.] In considering these defenses the statute of ten years creating title by adverse possession need not be discussed, since there was no actual possession of the land whatever until 1906 and the suit was brought within ten years from that time. Nor was section 7997, Revised Statutes 1909, operative under the facts in this case. The plain purpose of that statute, as is evidenced by the final pro-

viso therein, was to establish title by prescription in the patentees of land conveyed by the county courts of the State prior to 1880, who had claimed and paid taxes on such lands for more than twenty years. The act had no retrospective effect and could not prejudice the title which was conveyed by patent from Ripley County to the original grantor under whom plaintiff claims before the statute in question was enacted. The estate vested by that conveyance could not be divested by a subsequent patent from Butler County after the land had become a part of its territory in the circumstances shown in this record.

V. This leaves only the question of the application of the section known as the thirty-year Statute of **Thirty-year Statute.** Limitations (R. S. 1909, sec. 1884). There is proof of the payment of taxes by defendants, or those under whom they claim, for a period of more than thirty-two years up to and including 1913, unless a contrary showing was made when plaintiff gave in evidence two leaves taken from the book of the Assessor of Taxes for the years 1883 and 1892. These have been incorporated in the abstract and each has been magnified by a closer photograph. The magnified representation of the first of these shows between items numbered 606 and 607, and 607 and 608, a written insertion of the name "Hodgins, E. D." The insertion of the name before No. 607 is opposite 80, under the head of acres, and under the head of "By whom paid," the following entry: "Dec. 19—83, Keith and Righter." Between items 607 and 608, is the same insertion of "Hodgins, E. D." followed by 40 under the head of acreage, and under the head of "By whom paid:" "Dec. 19—83, Righter and Keith." The names of all other owners to whom lots were assessed are set opposite an appropriate numeral. No appropriate numeral appears in front of the two insertions of the name "Hodgins, E. D." It is, therefore, certain that the two insertions of the name "Hodgins, E. D." were not made at the time or before the other names of assessed owners were written in the

order of the serial numbers before each. Neither is there any evidence that "Keith & Righter" acted for the predecessors of plaintiff. This document is without any evidentiary force and may be disregarded.

VI. The next entry on the enlarged photograph is No. 716. The land there appears to be assessed to "Timberman, G. H." There the **Alteration of Tax Book.** shows an alteration by erasure of the words "Lot 2" and a writing above of "E 1-2" and a payment of the tax in 1892 by J. M. Hodgen. This photograph shows nothing as to the color of the ink.

Unless this payment of taxes was made on the land in dispute on behalf of the then owners of the record title, the bar of the statute for thirty years was sufficiently established by the testimony of witness Grea-son, Deputy County Clerk, and McClain, which disclosed that from 1882 to 1900, inclusive, the entire taxes on the land in dispute were paid by the railroad, which during that period was the holder of the title based on the patent from Butler County, except that no taxes were paid during the years 1888 and 1889 on the south half of the land. As to the latter date there was testimony tending to show that the railroad company paid the entire taxes, although for that year the land was assessed erroneously to John Mangold. How the north half was paid for the year 1888 rests in inference. But there was no evidence from any source that plaintiff, or those under whom he claims, made any payments for either of those years, and unless the entry contained on the second leaf of the Tax Assessor's book above referred to, afford a basis for a reasonable inference of such payment on behalf of plaintiff's grantors, then there is not a fact or circumstance in the record upon which such a finding could be predicated. The testimony as to payments by the railroad was given by the person employed in its land department, and was based on his own knowledge and own handwriting and recorded on a separate tax book which was copied from the

general book of assessments and furnished for the convenience of the land department of the railroad.

After the railroad parted with its title, from 1901 to 1913, defendants introduced the tax receipts. It is, therefore, clear to a demonstration that the bar of the statute of thirty years accrued unless it is shown by reasonable presumption from the interpolations and alterations on the second leaf of the Assessor's book that the payment there noted was made in behalf of plaintiff's grantors or by them. [Campbell v. Greer, 209 Mo. 199.]

The rule is well settled in this State that where documentary evidence is produced, showing on its face circumstances of suspicion, such as writings over erasures or the use of different inks, or interpolations, that they should not be received in evidence without explanation on the part of persons producing them.

In speaking of the alteration of a special tax bill by the erasure of descriptive words and the insertion of others, it was said: "And this fact was sufficient to excite suspicion and justify the court in requiring evidence that the alteration was bona-fide and proper before admitting the tax bill itself in evidence." [Bank v. Manning, 133 Mo. App. l. c. 298; Paramore v. Lindsey, 63 Mo. 63; Stilwell v. Patton, 108 Mo. l. c. 360.] There can be no question from a consideration of the photograph contained in the abstract that the second leaf of the Assessor's book bore on its face evidence casting suspicion upon the altered and added entries. While it is true that public records are subject to less "suspicion" in case of alterations than private papers (2 Cyc. 242) yet this rule does not "obtain if the interlineation or alteration is itself suspicious." [Cox v. Mignery & Co., 126 Mo. App. l. c. 682, 683 and cases cited; 2 Cyc. 242, par. h.] The evidence is undisputed that this land was never at any time assessed for taxation against any holder of the title under whom plaintiff claims, and that in the instance relied on to show such payment, the actual assessment was of 127 acres against "Timberman, G. H." This

fact, together with the patent erasure and alteration of the description of the land and with the failure to show, by oral testimony, the inclusion of the land in dispute in the larger acreage assessed against Timberman, necessarily creates such suspicion against this isolated excerpt from the Tax Assessor's book as to bring it within the rule, making it the duty of the party relying thereon to show that it was his land on which he was paying taxes. The record relating to the offer of this evidence is, to wit:

"Mr. Hill. I next read in evidence page 21 of the book for the year 1882 of Butler County, Missouri, identified by the witness J. D. Greason, and particularly the following line, beginning at figure No. 716, 'To whom assessed.'

"Mr. Curlee: We object to that for reasons—similar reasons given to the foregoing objection. Specifically this line, or lines about to be read from the entry, in the regular course of business, appears to be lot 2 of the southwest quarter and the south half of lot 2, northwest quarter. There has been erased the words: 'Lot 2' and substituted in a different handwriting, in a different colored ink, by interlineation in lieu of lot 2, the figures 'E 1-2.'

"Mr. Hill: The land in suit, and the same writing: 'Paid by J. M. Hodgen.'

"The Court: Objection overruled.

"To which ruling of the court the defendant, by counsel, objected and excepted at the time."

A careful consideration of the salient facts of this case exclude any reasonable inference or presumption of law of the payment of taxes by any other claimants to the land than the railroad and its successors in title. The plaintiff acquired his quit claim deed a few days before his suit was instituted. He had no knowledge of the non-resident grantor, other than the discovery of his name in the examination of abstracts. He at once wrote for information to Illinois and finally got in communication with the seeming title holder in Arkansas, from whom he obtained the quitclaim. He

never knew of any payment of taxes by any one who preceded him in the chain of title, was never provided with any tax receipts. The land itself was little more than a quagmire prior to 1906. In these circumstances and the clear and satisfactory evidence of continuous payment of the taxes by the parties in the line of defendants' title for over thirty-two years, we do not see how any doubt could exist as to the non-payment of any such taxes during the same period by the plaintiff or his predecessors in title. The only effort to rebut the case made by defendants was a production of the two leaves from the tax book, of insufficient probative force to overcome the clear inference of the failure of plaintiff or his grantor to pay, arising on the undisputed evidence given by defendants. While the thirty-year statute requires the party invoking it to show non-payment of taxes by the claimants of title, it does not intend that the evidence to support that negative shall be other or greater in degree than that which would generate belief in the minds of the triers of the fact. We think that quantum of proof in this case was sufficient to show by unavoidable inference that no taxes were paid on this land, either by plaintiff or those under whom he claims.

After a careful study of this record, we think the conclusion is clear that the title holders under whom plaintiff claims, completely abandoned the land; that they never paid any taxes thereon and that the immediate grantor of plaintiff was oblivious of any interest therein until he was ascertained by the inquiries which plaintiff set on foot, as he says, for "speculative purposes" after he had observed his name in an abstract and gotten into communication with him in Arkansas.

The result is that the judgment is reversed. All concur, *Woodson, J.*, in result.

**THE STATE ex rel. ALFRED VAUGHT, Collector of
the Revenue, v. ATCHISON, TOPEKA & SANTA
FE RAILWAY COMPANY, Appellant.**

Division One, March 12, 1917.

1. **BILL OF EXCEPTIONS: Change in Judge.** A bill of exceptions agreed to by both parties, and signed by the circuit judge who tried the case, after the county in which the case was tried had been detached from his circuit and added to another, will be considered on appeal. [Refusing to follow State ex. rel. v. Flick, 179 Mo. App. 236.]
2. ———: **Circuit Judge: State Officer.** The office of circuit judge is a State and in no sense a local office, and the judge as such may exercise his judicial functions in proper cases in any county. His powers, in whatever county exercised, rest upon his election or appointment and qualification by his oath of office; and whenever in the performance of his official duties, he enters upon the trial of a case, he acts within the limits of his official authority, which continues until the duty is performed or he goes out of office. If he tried the case and is still circuit judge he can settle and approve the bill of exceptions, although the county in which the case was tried is, by legislative enactment, no longer a part of his circuit.
3. **COUNTY TAXES: Road Purposes.** The county court in counties in which the assessed valuation of properties is less than six millions, may levy fifty cents on the hundred dollars for county purposes, and set aside fifteen cents of it to improvement of roads; and it can in addition to that fifty cents, levy an additional tax not exceeding twenty-five cents to be used for road-and-bridge purposes but for no other purpose.
4. ———: ———: **Twenty-Five-Cent Levy: Divided Into Two: County Purposes.** The county court levied fifty cents on the hundred dollars' valuation for county purposes, and divided it into five funds, distributing fifteen cents to the fund "for the payment of all necessary expenses incurred in the building and repairing of roads and bridges." The further words of the levy were: "It is further ordered that a property road tax of twenty cents on each one hundred dollars valuation on all property made taxable by law for road purposes be levied and collected for the use and benefit of the respective road districts of the county, when collected to be placed to the credit of said road districts for the purposes specified in the statutes. It is further ordered that a property road-and-bridge tax of five cents on the hundred dollars' valuation

State ex rel. v. Railroad.

be levied on all property made taxable by law, and when collected to be placed to the credit of said Road-and-Bridge Fund as provided by law." *Held*, that the first appropriation of fifteen cents was made in pursuance of the statute as the proportion of the road fund to be derived from the general revenue arising from the maximum levy of fifty cents for county purposes; and the other two levies of twenty and five cents were made under the constitutional amendment of 1908 and Sec. 10482, R. S. 1909, and while no good reason is apparent why the aggregate levy of twenty-five cents should have been thus divided into two, they were both made for the one purpose contemplated by that constitutional amendment and both were legal, and the levy of twenty cents cannot be disposed of as a levy for "county purposes" under section 11 of article 10 of the Constitution.

5. ———: ———: ———: **Not Designated as Special Tax.** The constitutional amendment (Sec. 22, art. 10, Constitution) does not require the name by which the "special tax" of twenty-five cents for road purposes is authorized, to be specified as a part of the record order levying it. The fact that it is levied nominally "for road and bridge purposes" and that it is in excess of the tax authorized by section 11 of article 10 of the Constitution, fixes its status as a special tax, and limits its use when collected. It is only necessary that it should be levied separately from and "in addition to" the levy "authorized for county purposes" and that it should appear to be "for road and bridge purposes."
6. ———: ———: ———: **Use for Other Purposes: Agency Expending It.** The twenty-five cent road tax authorized by the constitutional amendment of 1908 cannot be used for any other purpose than for roads and bridges, but neither the amendment nor the statute designates the particular agency, among those lawfully charged with the duties to which the purpose pertains, by whom it is to be expended.

Appeal from Scotland Circuit Court—*Hon. Charles D. Stewart*, Judge.

AFFIRMED.

Thomas R. Morrow, George J. Mersereau, John H. Lathrop and J. D. M. Hamilton, Jr., for appellant.

The two-mill road tax as ordered by the county court of Scotland County was levied under Sec. 10481, R. S. 1909, and was unconstitutional for the reason that the fifty-cent limitation of section 11, article 10, of the Constitution, had been exhausted by the current ex-

State ex rel. v. Railroad.

pense tax, section 10481, Revised Statutes 1909, being within the limitation of section 11, article 10, of the Constitution. State ex rel. v. Railroad, 87 Mo. 236; Brooks v. Schultz, 178 Mo. 222; Arnold v. Hawkins, 95 Mo. 569; Secs. 10481, 10482, 11422, 1423 and 11769, R. S. 1909; Secs. 1, 11, 12 and 22, art. 10 Constitution.

J. M. Jayne and *H. V. Smoot* for respondent.

Respondent challenges the bill of exceptions filed by appellants, in this, that the bill of exceptions as filed was not and is not signed by the judge of the 37th Judicial Circuit of which Scotland County is and was at the time bill was signed a part, nor by the judge of the Scotland County Circuit Court, but was signed by Chas. D. Stewart, who at the time he signed the bill of exceptions was and now is judge of the First Judicial Circuit, which circuit is and was then composed of Adair, Knox and Lewis counties. Laws 1913, p. 216. True the bill of exceptions purports to have been signed on the 15th day of May, 1914, by Chas. D. Stewart, Judge of the Scotland County Circuit Court, which was more than one year after Scotland County was detached from the First Judicial Circuit and long after the appointment of Hon. N. M. Pettingill as judge of the 37th Judicial Circuit, of which Scotland County was a part. Respondent contends that the Hon. N. M. Pettingill was the proper party to sign same and not Judge Stewart, and that the signing by Hon. Chas. D. Stewart was without authority and void, thus rendering the paper presented as a bill of exceptions no bill of exceptions. State ex rel. v. Flick, 179 Mo. App. 236; Sec. 2032, R. S. 1909. Going out of office means going out of the judgeship of the court over which he presided, though judge of another. Raney v. Packing Co., 132 Mo. App. 327; Fenn v. Reber, 153 Mo. App. 219.

BROWN, C.—This is a suit for taxes amounting to \$574.12, with penalties and attorneys' fees, in which the judgment was for the plaintiff. The defendant appeals.

The petition states that the taxes sued for were assessed and levied "for county purposes for the general road fund."

The defendant, after the ordinary general denial, answers as follows:

"Defendant further answering said petition states that the sum of \$574.12 alleged as owing by this defendant to the county of Scotland and designated in plaintiff's petition as the 'General Road Fund' is obtained by an attempted levy of two mills per dollar on the right of way owned by this defendant in said Scotland County, Missouri; and that this tax levy apparently is made under authority of section 10481, Revised Statutes 1909, said provision being known as the 'General Road Tax.'

"Defendant further states that all taxes that may be levied by county courts are designated in article 10 of the Constitution of the State of Missouri; that no such tax as provided by said section 10481, Revised Statutes 1909, is anywhere authorized in said Constitution and that said levy of two mills on the dollar, as provided for in section 10481, is without authority and void because it is contrary to and violative of article 10 of the Constitution of the State.

"Defendant further states that the total valuation of taxable property in said Scotland County for the year 1912, is less than six million dollars, and that by reason thereof under the limitations of article 10, section 11, of the Constitution of the State, the amount of taxes that can be lawfully levied upon property in said county is five mills on the dollar, and defendant states that the attempted tax levy of two mills on the dollar for road purposes is in excess of the lawful rate of taxes in said Scotland County, and is therefore specifically a direct violation of section 11, article 10, of the Constitution of Missouri, and is for that reason without authority and void."

The plaintiff replies, among other things, as follows:

"Plaintiff for further reply states that said county court in addition to the amount they could levy under section 11 of article 10 of the Constitution saw proper to make a special levy, as provided by section 22 of said article of the Constitution of Missouri, and that the taxes sued for by plaintiff in his petition are the said taxes so levied and provided by said section 22 of article 10 of the Constitution, and was in force at the time of the levying of said taxes."

The order of the county court for Scotland County levying these taxes is as follows:

"In compliance with section — of article —, chapter —, of the Revised Statutes of 1909 of the State of Missouri, it is ordered by the court that there be and is hereby levied on the assessed valuation of the railroads, telegraph and telephone property of the county for the year 1912, as adjusted and equalized by the State Board of Assessment and Equalization as shown by the certificate of the State Auditor for said year, the following taxes, to-wit: For state purposes, one and nine-tenths mills on each dollar valuation. For the purpose of paying the current expense of the county for the ensuing year to be known as the County Revenue Fund, there is levied five mills on each one dollar valuation to be apportioned as follows, to-wit: For Officers' Salary Fund, one and one-half mills. For Jury and Election Funds one-half of a mill. For Road-and-Bridge Fund, one and one-half mills. For Contingent Fund three-fourths of a mill. For the payment of interest on funding bonds as per order of the Scotland County Circuit Court at its February term, 1893, there is levied a tax of six mills on each one dollar valuation, to be known as the Bond Interest Fund. For the Special Road-and-Bridge Fund there shall be levied and collected one-half mill on each one dollar valuation. For the purposes estimated in the name prescribed by law there shall be levied and collected a tax of two mills on each one dollar valuation to be apportioned when collected to the several road districts as provided by law, to be known as the Road Tax Fund."

The case was tried to the court, Hon. Chas. D. Stewart, Judge of First Judicial Circuit, presiding, on May 17, 1913. Motions for new trial and in arrest were filed the same day and continued to the November term, when they were overruled and leave granted the defendant to file bill of exceptions during the following May term, at which, on May 15, 1914, it was signed by Judge Stewart and duly filed, being "approved and agreed to" by the plaintiff by writing under the signature.

The defendant contests the validity of the tax sued for on the ground that it exceeds the amount limited in section 11 of article 10 of the Constitution for county

**Bill of
Exceptions:
Change in
Circuit.** purposes and does not come within the authority granted by the amendment of 1908 embodied in section 22 of the same article. In support of its position it leans to some

extent upon the form of the order of the county court making the levy, which was given in evidence, but not set out in the pleadings. The plaintiff challenges the bill of exceptions, because it is signed by Judge Stewart of the First Judicial Circuit before whom the cause was tried in that circuit, while Scotland County was a part of it, instead of being signed by Judge Pettingill who had been appointed judge of the new Thirty-seventh Judicial Circuit, to which that county had been attached.

It will be seen that the point made is quite technical, the bill of exceptions having been signed by the judge who alone held in his own breast the proceedings, and being admitted to be true.

It is apparently conceded that before the enactment, in 1889, of the provisions of section 2032 of our present Revised Statutes, the judge who tried the cause was the only one competent to sign the bill, and that his death or retirement from office before signing it, would preclude the unsuccessful party to the judgment from a review of any matter of exception by appeal or writ of error. It was evidently to remedy this condition that the section was enacted. Its necessity flowed naturally

from those provisions of our code relaxing the common-law rule that exceptions must be written out and signed during the progress of the trial. This section provides: "In any case where the judge who heard the cause shall go out of office before signing the bill of exceptions, such bill, if agreed to be true by the parties to the action, or their attorneys, or shown to the judge to be correct, shall be signed by the succeeding or acting judge of the court where the case was heard." That this section was enacted to secure as effectually as possible the right of review of decisions of the trial courts is evident, and that its remedial provisions should be construed in harmony with that evident purpose goes without saying. It only remains to notice its application to the facts of this case.

The Constitution (Art. 6, sec. 24) provides that the State shall be divided into circuits, in each of which one circuit judge shall be elected and that whenever a circuit is abolished the office of the judge of such circuit shall cease. Section 29 of the same article is as follows: "If there be a vacancy in the office of judge of any circuit, or if the judge be sick, absent, or from any cause unable to hold any term or part of term of court, in any county in his circuit, such term or part of term of court may be held by a judge of any other circuit; and at the request of the judge of any circuit, any term of court or part of term in his circuit may be held by the judge of any other circuit, and in all such cases, or in any case where the judge cannot preside, the General Assembly shall make such additional provision for holding court as may be found necessary." We have quoted this section fully to call attention to the fact that the office of circuit judge is, by the terms of the Constitution which created it, a State and not in any sense a local office, and that the circuit and its courts are the judicial instruments of the State, and not of any particular locality. The judge is a judicial officer of the State and may exercise his functions as such in proper cases in any county. The circuit is simply the

territorial unit of his creation, and when it is abolished the office which depends upon its existence ceases (*Id.*, sec. 24), but the territorial unit of the *court* is the county.

We note particularly the clause in section twenty-nine of the same article which provides that at the request of the judge of any circuit any term of court or part of term in his circuit may be held by the judge of any circuit. Under this provision the request may originate in the caprice of the judge of the circuit in which the court is held, as well as in any other condition. In *Riggs v. Owen*, 120 Mo. 176, Dekalb County, which constituted a part of the Twelfth Judicial Circuit of which Hon. O. M. Spencer was judge, was attached to the Twenty-eighth Judicial Circuit, of which Hon. C. H. S. Goodman was judge. A cause which Judge Spencer had tried was pending in the DeKalb Circuit Court upon motion for a new trial, and while Judge Goodman "was present in court in apparent good health" Judge Spencer sat upon the bench and overruled it. When the motion was reached, Mr. Riggs, against whom the judgment had been rendered, objected on the following grounds: "First, because Judge Goodman was present in court in apparent good health; and, second, because Judge Spencer, as judge of the Twelfth Circuit, had no jurisdiction."

In sustaining the action of Judge Spencer this court in division said: "Judge Goodman was authorized to call Judge Spencer to hold this term or any part of it, and in the absence of any showing to the contrary we will presume that he did. [*State v. Gamble*, 108 Mo. 500.] It was most natural and proper that he should have done so, in order to close up the business which was then pending, especially to pass upon motions for new trial and prevent the unnecessary delay and cost of second trials. It is not for parties litigant to determine the condition of the judge's health, or his reasons for calling in another judge. The law has vested that power in him. [*State v. Ulrich*, 110 Mo. 350.]"

State ex rel. v. Railroad.

In State v. Gordon, 196 Mo. 185, the case was pending in the circuit court of St. Francois County in the Twenty-seventh Judicial Circuit, of which Hon. Robert A. Anthony was sole judge. An affidavit of prejudice was filed against him and he called in Hon. Samuel Davis, judge of the Fifteenth Judicial Circuit, to try the case. The defendant was convicted at the November term, 1904, motion for new trial was overruled at the same term and the defendant given until February 16, 1905, to file bill of exceptions. This time was extended until March 16, 1905, and again to April 15, 1905, both orders being made by Judge Davis, who signed the bill of exceptions and ordered it filed on April 12, 1912. No judgment was entered upon the verdict, nor sentence passed at the November term, 1904, at which the conviction was had, but afterward, on February 21, 1906, at an adjourned November term, 1905, Judge Davis, with the consent of Judge Killian, the successor of Judge Anthony, as judge of the Twenty-seventh Judicial Circuit, ordered a *nunc pro tunc* entry of judgment and sentence as of November 25, 1904. On the first Monday in January, 1905, Judge Killian had been elected to succeed Judge Anthony at the November election preceding, and Judge Davis had been elected at the same time his own successor. It was held that the judgment entered *nunc pro tunc* was a valid judgment, and that the bill of exceptions had been properly signed by Judge Davis, the court saying (p. 196): "It may be conceded that if Judge Davis had not been re-elected at the regular election in November, 1904, he would have had no authority whatever to enter the *nunc pro tunc* judgment and to pass sentence upon defendant, as it was only in his capacity of judge of the circuit court of the Fifteenth Judicial Circuit that he had such authority; but as he continued, without intermission, to be judge of that circuit, and his present or succeeding term of office as judge of said circuit, for which he had been duly elected, commissioned and qualified, commenced immediately upon the expiration of the term during which he presided at the trial of said case, there

was, therefore, no vacancy in said office, and we are of opinion that he retained jurisdiction of the case." The same ruling was made in *State v. McCarver*, 194 Mo. 717. While *Riggs v. Owen*, supra, is, as far as we can see, founded upon a state of facts precisely similar to this, the same principle is involved in all. The same question now before us was decided by the St. Louis Court of Appeals in *Patterson v. Yancey*, 97 Mo. App. 681, which held that the judge who tried the case properly signed the bill of exceptions, and notwithstanding the fact that, between the overruling of the motion for a new trial and the signing and filing of the bill of exceptions, the county in which the cause was tried had been detached from his circuit.

All these decisions rest upon the principle that under our Constitution and statute the judge of the circuit court is a judicial officer of the State whose powers, in whatever county they may be exercised, rest upon his election and qualification by his oath of office, and that whenever, in the performance of his official duty, he enters upon the trial of a case, he acts within the limits of his official authority, which continues until the duty is performed or he goes out of office. This capacity results from the nature of the duty, and has always been recognized by this court. [*Woolfolk v. Tate*, 25 Mo. 597; *Cocker v. Cocker*, 56 Mo. 180.] The same necessity in which this rule is founded afforded the incentive for the enactment of the law we are now considering. While, at the time of its enactment in 1889, the common law, through the official capacity and powers of the trial judge, carefully preserved to the litigant the means of preserving for review the rulings incident to the trial, it was possible these might be foreclosed by the cessation of the office of the trial judge before they had been properly preserved and recorded. The statute (R. S. 1909, sec. 2032) carefully covered this field, and its remedial words are no broader than its remedial purpose. It covers those cases only "where the judge who heard the cause shall go out of office before signing the bill of exceptions." To disregard

this language and substitute language of our own, requires a more powerful incentive than to embarrass the right of review which it was designed to secure.

We are aware that the Kansas City Court of Appeals in *State ex rel. v. Flick*, 179 Mo. App. 236, takes a different view of this question, but are not satisfied with its reasoning, and prefer to adhere to the doctrine of this court and that of the St. Louis Court of Appeals in the cases cited. We think that this bill of exceptions is properly before the court, and that it is our duty to consider the effect of the levy, which is the real subject of the controversy.

II. We are not favored with the views of the respondent upon the merits, either in brief or oral argument. It has preferred to put all its eggs in the basket **Rate of Taxation.** containing its objections to the bill of exceptions, and let us struggle as best we can with the merits, aided only by the exhaustive arguments, both printed and oral, of the appellant. The question is one of public importance, affecting the power of taxation for all purposes relating to roads and bridges.

The total valuation, for taxation, of the property of Scotland County is less than \$6,000,000, and section eleven of article ten of the State Constitution limits the annual rate of taxation for county purposes to fifty cents on each one hundred dollars of such valuation. That the establishment, construction and maintenance of roads and bridges in the county, except within the limits of municipal corporations charged with those duties, belongs in the category of "county purposes" is not denied.

Acting under the authority of statutes passed in pursuance of the constitutional provision referred to, the county court of Scotland County levied upon the property of the county at the May term, 1912, taxes for county purposes to the full amount of fifty cents on each one hundred dollars, and, in conformity with the provisions of section 11423, appropriated, apportioned and subdivided the fund so levied as follows: (1) for

the care of paupers and insane, five cents on each one hundred dollars; (2) for the payment of all necessary expenses incurred in the building and repairing of roads and bridges, fifteen cents on each one hundred dollars; (3) for salaries, fifteen cents; (4) for the payment of fees of jurors, judges and clerks of election and witnesses before the grand jury, seven and one-half cents; and (5) for the payment of current expenses of the county not otherwise provided for designated as the contingent fund, seven and one-half cents. The order then provides as follows: "It is further ordered that a property road tax of two mills on each one dollar valuation as shown by the assessor's book for the year 1912, on all property made taxable by law for road purposes, be levied and collected for the use and benefit of the respective road districts of the county, when collected to be placed to the credit of said road districts for the purpose specified in the statutes in such cases made and provided. It is further ordered that a property road-and-bridge tax of one-half of one mill on each one dollar valuation as shown by the assessor's books for the year 1912 be levied on all property made taxable by law, and when collected to be placed to the credit of said Road-and-Bridge Fund as provided by law." The remainder of the order, refers to the levy of money for the payment of interest and does not come within the constitutional limitation we have mentioned. It will be observed that the several amounts so apportioned, omitting the two items last mentioned, amount to the constitutional limit of fifty cents on each one hundred dollars, while the two additional items amount to twenty-five cents on each one hundred dollars. It is the amount collected from the two-mill levy which is the subject of this suit. We have set out this apportionment in full as spread upon the record of the county court in the statement which precedes this opinion.

The appellant states its position as follows:

"The two-mill road tax as ordered by the county court of Scotland County was levied under section 10481,

Revised Statutes 1909, and was unconstitutional for the reason that the fifty-cent limitation of section 11, article 10, of the Missouri Constitution had been exhausted by the current expense tax, section 10481, Revised Statutes 1909, being within the limitation of section 11, article 10 of the Constitution."

III. In 1908 an amendment to the Constitution was adopted and added to article 10 as section 22, which is as follows:

"In addition to taxes authorized to be levied for county purposes under and by virtue of section 11, article 10, of the Constitution of this State, **Special Road and Bridge Tax.** the county court in the several counties of this State not under township organization, and the township board of directors in the several counties under township organization, may, in their discretion, levy and collect, in the same manner as state and county taxes are collected, a special tax not exceeding twenty-five cents on each \$100 valuation, to be used for road and bridge purposes, but for no other purpose whatever; and the power hereby given said county courts and township boards is declared to be a discretionary power."

It is upon this amendment and the acts subsequently passed and incorporated in the Revised Statutes of 1909 that the validity of the tax in controversy is asserted and must depend.

No amendment was made to section 9283, Revised Statutes 1899, which is contained in the Revised Statutes of 1909 as section 11423, and was substantially followed in the apportionment to which we have already referred down to the last paragraph, in which the twenty-cent appropriation was made. This paragraph and all succeeding matter was added by the county court to the statutory form as it had existed for many years. The Act of 1909 (Sec. 10481, R. S. 1909) is as follows:

"The county court in the several counties of this State, at the May term thereof in each year, shall levy upon all real and personal property made taxable by law, outside of incorporated cities, towns and villages,

a tax of not more than twenty cents on the one hundred dollars valuation as a road tax, which levy shall be collected and paid by the collector into the county treasury as other revenue, and the county treasurer shall place the same to the credit of the road district from which said tax was collected, and shall pay the same to the overseer of said district on the warrants of the county court. The money derived from such road tax shall be expended by the respective road overseers in purchasing necessary tools with which to work the roads in their districts, in purchasing material to build or repair bridges and culverts, and for such other expenditures as may be necessary to keep the roads in their districts in good order: *Provided*, that the construction of all bridges and culverts shall be under the direction or supervision of the county highway engineer."

The next succeeding section (10482) is as follows:

"In addition to the levy hereinbefore authorized to be made, the county courts of the several counties of this State, other than those under township organization, may, in their discretion, levy and collect, in the same manner as state and county taxes are collected, a special tax not exceeding twenty-five cents on each one hundred dollars valuation, to be used for road and bridge purposes, but for no other purpose whatever, and the same shall be known and designated as 'the Special Road-and-Bridge Fund' of the county."

Again, in section 11769, evidently referring to the same subject, it is provided that "the county court of any county in the State which is not under township organization, . . . may, annually in their discretion, at the same time and in the same manner as taxes are now required by law to be levied for county purposes, levy an annual tax in addition to those now authorized by law in any amount not exceeding twenty-five cents on each one hundred dollars' valuation on all property subject to taxation in such county . . . to be known as a Special Road-and-Bridge Tax."

It is upon the interpretation of these three sections as applied to the levy before us that this case is to be determined.

It will be seen that there is no question as to the authority of the county court to levy the entire amount. Before the amendment of 1908 all road taxes were included in the levy authorized by the Constitution to be made for "county purposes." The form fixed by statute for the apportionment of this levy expressly authorizes the appropriation from the amount so raised of "a sum sufficient for the payment of all necessary expenses for the building of bridges and repairing of roads, including pay of road overseers." The constitutional amendment permits the twenty-five cent levy "*in addition to taxes authorized to be levied for county purposes under and by virtue of section 11,*" and the statutes enacted in pursuance of it contain the same authority. The amendment simply increases the amount which the county was authorized to levy under the provisions of section 11 from fifty cents to seventy-five cents on each one hundred dollars valuation, with the limitation that the entire additional levy must be made and used for road and bridge purposes and for no other purpose whatever. It imposes no *duty* upon the county court to appropriate any part of the levy for county purposes under section 11 to such uses, but left the *power* undisturbed. Even if the county court previously had the power, to transfer the road-and-bridge fund created under the provisions of section 11423 of the Revised Statutes of 1909 (*Decker v. Diemer*, 229 Mo. 296), *this* fund is to be kept sacred to the purpose for which it was levied. The question here is not whether the county court had power to levy this disputed tax (for the amendment places that beyond question), but whether it did it; that is to say, whether the words used in making the levy were apt and sufficient under the constitutional amendment and statutes enacted to carry it into effect.

IV. Section 11423 providing for the subdivision and apportionment of the levy for county purposes was enacted in 1879, and has ever since been co-existent

with section 11 of article 10 of the Constitution, in pursuance of which it was enacted. It was designed for the distribution of the revenue for "county purposes" authorized by that section of the Constitution, and specified five funds to which only it can be appropriation by the county court. One of the five is the fund referred to in section 10481 of the present revision, and was limited to twenty cents on the one hundred dollars valuation. The county court levied the full amount of fifty cents of the one hundred dollars' valuation authorized by the Constitution and section 11422 of the Revised Statutes, and then proceeded to divide it into the five funds authorized by section 11423; distributing fifteen cents on the one hundred dollars of valuation to the fund "for the payment of all necessary expenses incurred in the building and repairing of roads and bridges." That this appropriation was made in pursuance of the statute as the proportion of the road fund to be derived from the general revenue resulting from the maximum levy of fifty cents for "county purposes" is plainly expressed in the order itself and does not admit of question. So far as the amount of road and bridge taxes to be appropriated from that particular levy was concerned it exhausted the authority of the court, because in connection with the four other appropriations made at the same time it exhausted the amount of the fifty cents constitutional levy. There was nothing left for further distribution. The court then proceeded to make another and additional levy in these words: "It is further ordered that a property road tax of two mills on each one dollar valuation as shown by the assessor's books for the year 1912 on all property made taxable by law for road purposes be levied and collected for the use and benefit of the respective road districts of the county, when collected to be placed to the credit of said road districts for the purpose specified in the statutes in such cases made and provided. It is further ordered that a property road-and-bridge tax of one-half of one mill on each one dollar valuation as shown by the assessor's books for the year 1912 be

levied on all property made taxable by law, and when collected to be placed to the credit of said road and bridge fund as provided by law."

That the last two levies were intended to be made under the authority granted by section 22 of the Constitution and section 10482, Revised Statutes 1909, necessarily follows from the fact that the previous levy of fifteen cents embodied in the second clause of the apportionment of fifty cents for county purposes under the provisions of section 11 of article 10 of the Constitution, and section 10481 enacted in pursuance thereof, exhausted the power of the county court under the law as it stood before the amendment. The two levies of twenty cents and five cents last mentioned, amounting to twenty-five cents on each one hundred dollars of valuation, must therefore stand upon the amendment of 1908 and section 10482 or not at all.

The defendant paid the last of these additional levies amounting to five cents on the one hundred dollars and only disputes the twenty cent levy. On what theory this was done is not clear to us; for it was certainly void if its validity must depend on the authority of section 11 of article 10 of the Constitution, being in excess of the fifty cent limit. If made under section 22, article 10, and section 10482 it comes within the amount of the additional levy of twenty-five cents so authorized. It is therefore evident that the county court in making each of them, attempted to act under the amendment and section 10482. The only question is whether it failed to express its intention.

V. The fact that the twenty-cent levy only is in dispute, suggests that it might have been thought that the additional tax of twenty-five cents on each one hundred dollars of valuation must necessarily be levied at a single stroke of the ax, and that the payment of either would therefore discharge the liability for both. We think this too technical for serious consideration, and that the real question is whether it comes within the authority of the amendment of 1908; and that upon this record we

**Division
of Special
Road Tax.**

have only to consider the validity of the twenty-cent levy from that standpoint.

VI. Section 22 of article 10 of the Constitution, which we have already quoted, provides that in addition **Diverting Road Tax to County Purposes.** to taxes authorized to be levied for county purposes under and by virtue of section 11, article 10, the county court may in its discretion levy and collect a special tax not to exceed twenty-five cents on the one hundred dollars of valuation, to be used for road and bridge purposes, but for no other purpose whatever. This provision uses no other term of description than "special tax." The word special only means relating to a particular thing or class of things, and is explained fully by the clause requiring it to be used for road and bridge purposes, but for no other purpose whatever. The necessity for its use in this connection is made plain in *Decker v. Diemer*, supra. This court *In Banc* said (p. 336): "The bald question then is: May a county court transfer a surplus and divert it from a fund having a designated and given purpose, to another legitimate county purpose, by force and reason of the satisfaction of the original use or purpose? We answer that question in the affirmative." That portion of the levy authorized by the Constitution for county purposes which had been set apart for roads and bridges *might* be diverted from such purpose, and the people thought best to and did confine the additional levy to use for the special purpose for which they authorized it and no other. Thus any road-and-bridge tax in excess of the amount allowed by the Constitution for county purposes must be held sacred to the use for which it was authorized. The fact that it is levied nominally "for road-and-bridge purposes" and that it is in excess of the tax authorized by section 11, article 10, of the Constitution, fixes its special status and limits its use. The amendment does not purport to prescribe a name by which it must be called upon the record, but only to designate the use to which it shall be limited when collected. It is only necessary that it should be made

Whitsett v. Carthage.

separately from and *in addition to* the levy "authorized for county purposes," and that it should appear to be "for road-and-bridge purposes." All else is taken care of by the law which guards the legislative intent when once expressed. The same words are transferred from the Constitution to section 10482 of the present Revised Statutes, and there is nothing in the act in which they occur that suggests a different interpretation. There is nothing in either Constitution or statute which suggests the intention that it be expended through any particular agency among those lawfully charged with the duties to which its purpose pertains, or requiring that it be done in a single clause of the order making the levy or in an undivided amount. This feature was recently discussed and determined by us in *State ex rel. v. Burton*, 266 Mo. 711.

The judgment of the circuit court is sustained. *Railey, C.*, concurs.

PER CURIAM:—The foregoing opinion of *Brown, C.*, is adopted as the opinion of the court. All of the judges concur.

J. M. WHITSETT et al., Appellants, v. CITY OF CARTHAGE.

Division One, March 12, 1917.

1. **SEWER:** Taxation of Agricultural Lands. Notwithstanding plaintiff's lands are used largely for agricultural and garden purposes, have not been platted into blocks and lots, constitute 160 of the 1600 acres in the sewer district, and the tax against them to construct the main sewer will be \$36 per acre, and if constructed no laterals from it through the lands are at present contemplated, yet if there are 3500 inhabitants residing within the district, there are churches, schools and hospitals, the sewer is to be constructed along the course of natural drainage, the district is now totally without sewers and there is no other feasible method for draining the

Whitsett v. Carthage.

lands included therein, and these agricultural lands within the city limits when laterals are constructed can be drained by the main sewer, its construction will not be enjoined on the ground that the ordinances authorizing it are unreasonable and oppressive.

2. ———: ———: **Public Health.** All persons hold their property subject to the laws providing for the public health, safety, morals and general welfare; and if a main sewer is necessary for the public health of a large portion of a city, and will benefit not only the parts densely populated but in time the agricultural lands included in the district also, the owners of such lands cannot enjoin its construction on the theory that it is not necessary for the present enjoyment and use of those lands, they cannot be immediately served by it, and the costs to be taxed against them will be very heavy, possibly confiscatory.
3. ———: **Benefits.** It is not only benefits to real estate that are to be considered in sewer construction. Primarily the benefits are conferred on all the people of a district, through sanitation and health conservation, and secondarily on the real estate taxed with the cost, in that it is made more desirable for business and residential purposes and increased in value.
4. ———: ———: **Laterals.** The owners of land not reached by lateral sewers are benefited by laterals which connect other improved lands in the district with the main sewer, since they serve to drain away the refuse that would endanger the public health.
5. ———: **Laterals: Time of Construction.** The law does not require all lateral sewers of a drainage district to be constructed at the same time. They may be constructed as the necessity for them arises, and not before.
6. ———: **Taxes in Proportion to Benefits.** The fact that the benefits to lands taxed with the costs of a sewer do not exactly equal such costs will not invalidate the construction or the tax bills. Approximate equality is all the law requires.
7. **CITY EXTENSION: Validity.** A contention that the city limits were not legally extended to embrace the lands to be taxed with the costs of constructing a main sewer because no notice of the election was given, will not be considered, if fifteen years have elapsed since the extension was made.

Appeal from Jasper Circuit Court.—*Hon. D. E. Blair,*
Judge.

AFFIRMED.

Spencer & Grayston, A. L. Thomas and Shannon & Esterly for appellants.

(1) The foundation of the power to lay a special assessment or a special tax for local improvements of any character, whether opening, improving, or paving a street or sidewalk, or constructing a sewer or cleaning or sprinkling a street, is the benefit which the improvement or service confers on the owner of the abutting property or the owners of the property in the assessment or special taxation district which is different from the general benefit which such owners enjoy in common with the other inhabitants or citizens of the municipal corporation. *Walker v. Jamison*, 140 Ind. 591, 28 L. R. A. 679, 49 Am. L. R. 222; *Union Trust Co. v. Paganstretcher*, 80 Pa. St. 505, 21 Am. St. 112; *Hale v. Kenosha*, 29 Wis. 599; *McQuillin, Municipal Corp.*, sec. 2018. Special assessments are explained and their judicial history given in *Macon v. Petty*, 34 Am. Rep. 457. (2) The whole theory of local taxation or assessments is that the improvements for which they are levied afford a remuneration in way of benefit. A law which would attempt to make one person, or a given number of persons under the guise of local assessments, pay a general revenue for the public at large would not be an exercise of the taxing power, but an act of confiscation. In effect it would be transferring the property of one individual to another. These are the legal truisms which have long been entertained and firmly established. *McQuillin*, sec. 218; *McCormack v. Patchin*, 53 Mo. 33; *St. Louis v. Clemans*, 49 Mo. 552; *Garrett v. St. Louis*, 25 Mo. 505. (3) The principle underlying special assessments to meet the cost of public improvements is that the property upon which they are imposed is peculiarly benefited, and therefore the owners do not in fact pay anything in excess of what they receive by reason of such improvement. The exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him, is to the extent of such excess, a taking, under the guise of tax-

ation, of private property for public use without compensation. *Norwood v. Baker*, 172 U. S. 269; *McQuillin*, sec. 2018; *State v. Newark*, 37 N. J. L. 415; *Hutcheson v. Starrie*, 51 S. W. 848. (4) The power to assess private property for public improvements, beyond the uniform rate prescribed by the Constitution, is derivable only from the fact that such property is enhanced in value to the amount of the tax, beyond that of other citizens, by the public betterment. Any assessment not thus bottomed is void. *Jaicks v. Oppenheimer*, 175 S. W. 972. (5) Although municipal corporations are prima facie the sole judges of the necessity of their ordinances, yet if one is altogether unreasonable and oppressive, it may be vacated for that reason alone. *Hannibal v. Tel. Co.*, 31 Mo. App. 23; *St. Louis v. Theater Co.*, 202 Mo. 699; *St. Louis v. Russell*, 116 Mo. 258; *Salem ex rel. v. Young*, 142 Mo. App. 170; *State ex rel. v. Terminal Ry.*, 168 S. W. 1144; *Tobacco Co. v. St. Louis*, 157 S. W. 502; *Zumault v. K. C. Air Line*, 71 Mo. App. 676; *Carrigan v. Gage*, 68 Mo. 545; *Lamar v. Weidman*, 57 Mo. App. 507; *Plattsburg v. Hagenback*, 98 Mo. App. 671; *Herman v. Handlan*, 59 Mo. App. 490; *Springfield v. Jacobs*, 101 Mo. App. 340; *White v. Railroad*, 44 Mo. App. 542. (6) While the courts may not interfere with the legitimate use of the legislative power delegated to a municipal corporation, they may interfere to prevent its abuse. *Skinker v. Heman*, 148 Mo. 355; *St. Louis v. Weber*, 44 Mo. 550; *McCormack v. Patchin*, 53 Mo. 33; *Carrigan v. Gage*, 68 Mo. 541; *Halpin v. Campbell*, 71 Mo. 493; *Kelley v. Meeks*, 87 Mo. 401; *Tarkio v. Cooks*, 120 Mo. 9; *St. Louis v. Packing Co.*, 141 Mo. 375. (7) Where a sewer is constructed mainly for the benefit of the public, the city has no power to pay for its construction by issuing special tax bills. *Heman v. Handlaw*, 59 Mo. App. 490. (8) The reasonableness of an ordinance extending city limits may be questioned collaterally in a suit to collect a special tax bill. *Salem ex rel. v. Young*, 142 Mo. App. 170; *Springfield v. Jacobs*, 101 Mo. App. 340.

Geo. W. Crowder and Allen McReynolds for respondent.

(1) Public improvements are not to be treated as evils which are to be judicially circumvented; hence, laws anent public improvements should be subjected to a reasonable analysis only, with the view that they are passed in the spirit of justice, and for the general welfare of community life, in the interest (as to sewers) of the public health. *Gist v. Construction Co.*, 224 Mo. 397; *Waddell Inv. Co. v. Hall*, 164 S. W. 541. (2) The controlling test of benefits conferred, where a large area is sought to be drained by means of a trunk sewer for an outlet, is whether the lands included within the benefit district are, by reason of their topography, drainable into such trunk sewer by means of district or lateral sewers. *Page & Jones, Taxation by Assessment*, sec. 563, p. 917-921, sec. 658, p. 1114; *St. Joseph v. Owen*, 110 Mo. 445. (a) Such land may be assessed even though the city waterworks has not yet been extended to it. The presumption will be indulged that the city authorities will perform their functions in good faith. *Page & Jones, Taxation by Assessment*, sec. 563; *McGee v. Walsh*, 249 Mo. 266. (b) And, too, though such lands may be unimproved, and unplatted, and may have no occasion to make immediate use of the sewer. *McGee v. Walsh*, 249 Mo. 266; *Dillon's Municipal Corporations* (5 Ed.), sec. 1460; *Salem v. Young*, 142 Mo. App. 160. (3) Plaintiffs cannot insist upon having the reasonableness of ordinance 103 determined, with respect to the inclusion of their lands, from the viewpoint of the condition in which they have voluntarily left such lands, or from any particular purpose for which they elect to hold such lands. *Page & Jones, Taxation by Assessment*, secs. 608, 609, p. 1012; *Mitchell v. Negau-nee*, 113 Mich. 359, 76 Am. St. 468; *Salem v. Young*, 142 Mo. App. 160. (4) Land is benefited by the construction of a sewer, in contemplation of law, when such land is practically susceptible of being drained thereby. *Page & Jones, Taxation by Assessment*, sec. 563, p. 917.

(5) The broad terms of section 9281 to 9298 inclusive, R. S. 1909, contemplate the assessment of all lands drainable into the proposed trunk sewer, it being designed as an outlet for the entire drainage area, and no ultimate hardship can occur to these plaintiffs thereby. Secs. 9281-9298, R. S. 1909; Page & Jones, *Taxation by Assessment*, sec. 563, p. 921; *McGee v. Walsh*, 249 Mo. 266. (6) It is not compulsory, nor even contemplated, by Secs. 9281-9298, R. S. 1909, under authority of which this proposed system of drainage has been worked out, that district or lateral sewers must be undertaken and constructed at the same time, and in the same connection. Page & Jones, *Taxation by Assessment*, sec. 327, p. 506. (7) Assessments may be properly levied to pay for the construction of a trunk sewer for the purpose of affording an outlet for a large drainage area on the theory that all lands drainable thereby are especially benefited by reason of having the means of an outlet for such lateral sewers as may be constructed from time to time. Page & Jones, *Taxation by Assessment*, sec. 327, p. 506; *Bassett v. New Haven*, 55 Atl. 579; *Alley v. Lebanon*, 44 N. E. 1003; *Hanscom v. Omaha*, 7 N. W. 739; *Ford v. Toledo*, 59 N. E. 779; *Imp. Co. v. Kansas City*, 172 Mo. 523.

WOODSON, J.—This suit was instituted in the circuit court of Jasper County by the plaintiff to enjoin the city of Carthage from constructing a main sewer therein in conformity to certain ordinances duly enacted by said city.

The trial resulted in a decree in favor of the defendant, denying the injunction, and after taking proper steps the plaintiffs duly appealed the cause to the Springfield Court of Appeals. Upon motion the cause was properly transferred by that court to this.

The construction of the sewer is resisted principally upon the grounds that the ordinances ordering it are unreasonable and oppressive. This calls for a statement of the substance of the evidence.

The facts of the case are briefly these:

Whitsett v. Carthage.

On the first Tuesday in April, 1912, the defendant held an election for the purpose of adopting the provisions of sections 9281 to 9298, inclusive, Revised Statutes 1909, relating to the construction of sewers in cities of the third class, and by virtue of said election, said sections were adopted.

On the 11th day of August, 1913, the defendant passed Ordinance No. 102, dividing the territory of said city into sewer districts, as contemplated by the provisions of said sections 9281 to 9298, inclusive.

On the same day, namely, August 11, 1913, the defendant passed Ordinance No. 103, providing for the construction of a main trunk sewer, to be paid for by special tax bills on the lands belonging to plaintiffs and other lands.

Pursuant thereto, the defendant was about to advertise for bids for the construction of said sewer, when this suit was commenced, June 23, 1915.

The plaintiffs are owners of about 160 acres of land against which the defendant proposes to issue special tax bills to pay for the construction of said sewer. .

The plaintiffs' evidence tended to prove that the lands belonging to plaintiffs are occupied and used exclusively as farm lands and for truck gardening, etc.; that they are not held for the purpose of being platted and sold as town lots; that they are not in demand for urban purposes; that the growth of the city in the past twenty-five years has not been such as to indicate that they will, within any reasonable length of time, be in demand for urban uses.

The lands of all the plaintiffs, except the Block forty-acre tract, are in the southwest quarter of section Nine, Township Twenty-eight, Range Thirty-one. The Block forty is the northwest quarter of the northwest quarter of said Section Nine.

The southwest quarter of Section Nine is the extreme southwest portion of the city. While one ten-acre tract in the north-central portion thereof was, many years ago, platted into town lots, it was a failure as a

city addition. No streets or alleys have ever been opened or improved therein, and it is occupied as acreage property. None of the remainder of said quarter section has ever been platted.

The city owns the municipal light plant and waterworks. No portion of the lands belonging to the plaintiffs is provided with electric light or water service. The nearest light is located at the northeast corner of the southwest quarter of said Section Nine. The nearest water plug is located at the corner of Centennial Avenue and Forest Street, about four hundred feet east of the northeast corner of said quarter section. The policy of the city with reference to the extension of its water mains is that no extensions will be made unless the prospective consumption of water will produce an annual income of five per cent of the cost of the extension.

There are only twelve families living on said quarter section, and it would cost several thousand dollars to extend the water mains to all parts of the same, so that the sewers, if constructed, could not be used by any of the plaintiffs.

In 1890, the population of the city was 7,981; in 1900, it was 9,416; in 1910, it was 9,483, and at the time of the trial of the case it was 9,211. About one-half of the unoccupied land within the city limits which is available for and adaptable to residence purposes, is within the proposed sewer district.

The lands belonging to plaintiffs, in the southwest quarter of Section Nine, lie south of Centennial Avenue, and are one-fourth of a mile west of Garrison. The southwest quarter of Section Nine, in which all the lands of plaintiffs lie, except the Block forty, is one-fourth of a mile west of Garrison Avenue. A good portion of the eighty-acre tract extending from Garrison Avenue on the west to Grand Avenue on the east, and from Centennial Avenue on the north to Fairview Avenue on the south, has been platted and offered for sale for the last twenty-five years. The street car track, on which cars are run each way every half hour, runs through this tract, on Main Street from north to south, and along the

south side thereof on Fairview Avenue. A large portion of this territory was settled up twenty-five years ago. At the present time there are only thirty-six dwelling houses on the north forty acres of that eighty-acre tract, and only nine dwellings on the south forty acres of said eighty-acre tract. On the north half of the eighty-acre tract immediately west of Garrison Avenue and south of Centennial Avenue there are only seventeen dwellings, and on the south half of the same there are only nine dwelling houses. .

There are only seventeen dwellings on the 160-acre tract immediately east of Grand Avenue and south of Centennial Avenue.

All of the above described tracts embracing one-half section of land are well adapted to urban purposes, and each and every one of them is closer to the center of population of Carthage than any portion of the southwest quarter of said Section Nine.

The evidence also tended to show that some years ago the forty-acre tract immediately south of Fairview Avenue and west of Hazel Avenue was platted into lots and sold at auction, both additions being on the street-car line, and that both additions have been abandoned as urban property, and divided up into acre property and used for farming purposes.

That the system of sewer districts attached and made tributary to the main sewer in controversy contains about 826 acres, and that only about 26 acres the same have close water connection, and that the water mains would have to be extended before the remaining 800 acres could be benefited by the construction of said sewer or by the construction of district sewers to connect therewith; and there is no intimation in the defendant's evidence, or elsewhere in the record, that the city proposes or contemplates the construction of the necessary extension of its mains.

In District 44 there are 87 acres and 5 houses, in District 35 there 68½ acres and 9 dwelling houses. In District 24 there are 140 acres and 24 residences. The

cost of the construction of the main sewer would be \$36.60 per acre.

The evidence shows that the lands belonging to plaintiffs are worth about \$200 per acre, without improvements, in five-acre tracts.

The evidence tending to show the facts regarding the lands in the southwest quarter of Section 9 is also applicable to the Block forty-acre tract,

Carthage was incorporated under a special charter in 1873. At that time, the southwest quarter of Section Nine was not included within its limits. Subsequently the city attempted to extend its limits so as to include said territory, but no notice of the election held for that purpose seems to have been given.

No provision is made by Ordinance No. 103 to construct laterals to connect the lands in controversy with the proposed sewer and in fact it does not seem to be the purpose of the city to do so.

The evidence for the defendant tended to show that the city of Carthage is a city of the third class under the laws of the State of Missouri. It has a population of approximately ten thousand inhabitants, and lies on a slope south of the banks of Spring River. Its natural drainage is from the south to the north. The distance from the river to the south bluff of Spring River in the city of Carthage varies from a mile to a few feet. At the east end of town the limestone bluff diminishes and disappears. Towards the west side the bluff comes almost to the river.

The natural drainage of the town is in three areas: the central area, which is geographically very much smaller than the rest of it, but which includes the business portion of the city; the eastern area, which is made up of a long draw and its tributaries which drain the eastern portion of the city; and the western area, which covers probably half of the geographical area of the city, and is that territory which is tributary to a long draw extending from the southern part of the town in a northwesterly direction to a point outside of the corporate limits.

The central area has been sewered for a number of years. Recently a sewer was constructed in the eastern portion of the city and that part of the town has the sewerage which is necessary for the proper drainage of a healthful community.

The western drainage area, which is described above, includes in its natural-drainage boundaries some of the best residence sections of the city, and the lack of sewerage has been a menace to the health of this portion of the city, and an object of incessant agitation and interest on the part of many citizens of that part of the city. In that section there are school houses, churches, a hospital, and other public buildings which go to make up an important part of the community life.

At the general municipal election in April, 1912, the city of Carthage duly adopted sections 9281 to 9298 inclusive, Revised Statutes 1909, and the result of said election on the proposition to adopt, was duly proclaimed as provided by said section 9281.

Thereafter, on the 11th day of August, 1913, the council passed ordinance No. 102 subdividing the unsewered territory of the city into sewer districts, numbered from 10 to 69, inclusive, there being at the time of the adoption of said laws, nine sewer districts supplied with sewers under the statutes operative prior to said adoption.

After the passage and approval of ordinance No. 102, and on the same date, the council passed ordinance No. 103 providing for and ordering the construction of the trunk sewer here in question, declaring therein that sewer districts numbered 17 to 44 inclusive were deemed to be benefited thereby, except district No. 20, which was found by the council not to be drainable into said trunk sewer, and, therefore, not benefited by the construction thereof. The council, further, by said ordinance No. 103, adopted the plans and specifications for said trunk sewer, and defined the out-boundary lines of said benefit territory, embracing therein sewer districts numbered 17 to 44 inclusive, except district No. 20.

The lands of defendants lie in districts 24, 35, and 44, and range in quantities from 4 to 50 acres, aggregating 138 acres. All said lands lie in the southwest quarter of section 9, township 28, range 31, except the block 40, which lies in the northwest quarter of the northwest quarter of said section 9. It is not disputed that the lands lying within the sewer districts constituting the benefit territory, including the lands of all the appellants, occupy the same drainage area which this trunk sewer has been designed to serve, and that none of said districts can have any other outlet than through this trunk sewer, except through parallel lines running to Spring River, which is more than a half mile distant from the point on the western boundary of the city, at which all said lines would have to leave the city limits.

The sewer in question is a large trunk sewer commencing at a given point between districts 40 and 42, passing thence through the low grounds in the drainage area to a given point at the western boundary of the city, on the line separating districts 17 and 18, and thence, beyond the city limits, a distance of more than one-half mile to and into Spring River, in which said sewer is to discharge.

This trunk sewer will presently serve by means of district or lateral sewers 3500 to 3600 people, residing in the various districts—more than one-third of the population of the city. Besides, there is included within the territory which said sewer is designed to serve, a hospital and other public buildings herein above mentioned.

The above statement of the case is largely taken from the briefs of counsel for both the plaintiffs and defendant, which are substantially correct.

I. As shown by the statement of the case, the plaintiffs seek to enjoin the construction of the main sewer mentioned therein for the reason, principally, that the ordinance authorizing its construction is unreasonable, unjust and oppressive, in that their lands, used for agricultural and garden purposes, through which a part of the sewer passes, and

Sewer:
Agricultural
Lands.

which will have to bear a large portion of the cost of construction, will not be correspondingly benefited thereby, practically amounting to a confiscation of the same.

This contention of plaintiffs is untenable. The evidence shows that the city of Carthage has a population of approximately ten thousand, and lies on the southern slope of the banks of Spring River, the natural course of drainage—the slope being from south to north; the distance from bluff to the river varies from a few feet to a mile. At the east end of the town the bluff diminishes and disappears, while at the west end it is higher and almost extends to the river.

The natural drainage of the city is divided by natural conditions into three areas, the eastern, central and western; the eastern is made up of a long draw and connecting depressions and tributaries; the central is separated by rising ground from the eastern and western areas, and is much smaller than either of the other two, but includes the business portion of the city; and the western, which embraces practically one-half of the entire area of the city, about 1600 acres, and is tributary to a long draw or depression extending from the southern part of the city in a southwesterly direction to a point outside of the corporate limits.

The eastern and central areas have been properly sewered for drainage and sanitary purposes, but the western area is without sewers, and that portion of the city is dependent almost entirely upon vaults, basins and natural drainage; this has been a constant menace to the health of that portion of the city.

About thirty-five hundred people reside in this area, and there are situate therein schools, churches and the city hospital, and other public buildings.

These conditions clearly show the crying necessity for proper sewerage in that portion of the city.

Opposed to that necessity, the plaintiffs, citizens of Carthage, refer to the large cost of the sewer, about \$36 per acre, their large real estate holdings, about one hundred and sixty acres, in the remote parts of said western drainage area, embracing about eight hundred

and twenty-five acres, and contend that on account of the size of those holdings, the small number of residences thereon and the comparatively small benefits they will derive from the sewerage, a great hardship would be worked upon them—amounting to injustice and oppression, if not a confiscation of their property.

That contention must also be viewed from a different angle from that suggested by counsel for plaintiffs.

In pursuance to the requirements of section 9282, Revised Statutes 1909, the city by ordinance No. 102, divided the unsewered territory of the city into sewer districts, numbered from 10 to 69, inclusive, there being at the time of the adoption of said section, nine sewer districts supplied with sewers under the statutes in force prior to said adoption.

Subsequent to the passage of said ordinance No. 102, the city enacted ordinance No. 103, ordering the construction of the main sewer here in controversy, declaring therein that sewer districts numbered 17 to 44, inclusive, were deemed to be benefited thereby, except No. 20, which the counsel found could not be drained into said sewer or benefited thereby; also adopted plans and specifications for the construction of said sewer, as required by said sections of the statutes.

Plaintiffs' lands lie in districts twenty-four, thirty-five and forty-four, and vary in quantities from four to fifty acres, aggregating according to defendant's evidence, one hundred and thirty-four acres, and that of plaintiffs to one hundred and sixty acres.

It is not denied that the main sewer in question will, by means of district or lateral sewers, drain all of plaintiffs' lands when constructed and connected with it; but the main bone of their contention is that this main sewer will be of no benefit whatever to them until the lateral sewers are constructed and connected therewith, which are not authorized to be constructed by said ordinances, and therefore their lands will be taxed at \$36 per acre without any corresponding benefit; it is also contended that even though the lateral sewers were to be constructed, then their construction would cost approxi-

mately \$190 in addition per acre, making a total cost of about \$225 per acre for the construction of the main and lateral sewers.

For the sake of argument, let us assume these figures to be correct (which is only an assumption, as the lateral sewers have not been ordered constructed, and consequently no plans or specifications therefor have been made, nor have estimates and bids been made of the cost of furnishing the materials and performing the labor necessary for their construction), then it is apparent that from this record there is no present necessity for the lateral sewers and we must presume that the city council will not violate its duty and order their construction in the absence of such necessity; however, should it so do, then and not now, would be the proper time to challenge the reasonableness and validity of an ordinance ordering their construction.

Under the foregoing view of the case we have only to do with the construction of the main sewer in question, the only one ordered constructed. It may for argument's sake be conceded that the plaintiffs' property will not, at the present, receive as great a relative benefit from this sewer as will the other residences in that part of the city; but that is due to the fact that their property is not so densely populated, and consequently that part of their farms and truck patches not used for residence purposes does not need such drainage. But that is not all that is in this case; every person in this State and country holds his property subject to the laws providing for the public health, safety, morals and general welfare, and, if taken or damaged for any one or more of those purposes, then he is entitled to just compensation therefor; likewise, his property must bear its just portion of the cost and expense of securing that protection. Both of those propositions are elementary; and it cannot be disputed that the main sewer in question is of great necessity for the preservation of the public health of the entire western portion of the city; not only that part of it densely populated is benefited, but also that part occupied by the plaintiffs. No one could seriously contend

that the deposit of the refuse of that part of the city into vaults or the discharge of it upon the surface of the ground, so as to find its way to Spring River through or along the natural draws or depressions before mentioned, would be, and, as the evidence shows, is, a continuing menace to the public health, especially to all that part of the city including the plaintiffs. The public health is menaced and endangered by the aggregation of filth and refuse of the entire district, and is not limited to accumulations thereof upon or about each separate lot or tract of ground located therein. We know from the laws of gravity, observation and experience, that garbage and refuse of a city and elsewhere, if not removed and cared for, will seep through the earth and drain down hill to the lower levels, and there become more poisonous, sickly and deathly than upon the higher grounds; this is true for the reason that the rains, snows and seepage will dispose of and carry much of it to the low places; so from a sanitary point of view, the disposition of the sewage of that part of the city lying higher up the slope than the property of the plaintiffs, is of equal benefit, if not greater to plaintiffs, than it is for the people residing above them. The chief purpose of a sewer system is the protection of the public health, and as we have seen, the plaintiffs' property will be equally protected in that regard by the sewer in question; and it is not therefore true, as contended for by counsel, that they are not benefited thereby, or that they are not equally protected with the other residents of that part of the city.

Counsel for plaintiffs seem to think that the benefits to real estate only can be considered in the construction of sewers. While in a technical sense that may be true, but in a practical sense, it is only indirectly true; in a primary sense, the benefits are conferred upon the entire people of the district, and secondarily upon the real estate, by virtue of its being thereby made more desirable for business and residential purposes, which correspondingly increases the value of the land—presumably equal to the cost of construction, but perhaps not exactly in all cases.

The lateral sewers, as previously shown, will receive the refuse of the upper part of the city, and discharge it into the main sewer, and thereby prevent the same from being discharged into natural and open drains running through or near plaintiff's property, and thereby prevent it from seeping through the ground and otherwise flowing upon plaintiffs' property, which, if not thus prevented, would render their section of the city unsanitary; and in that way the plaintiffs will receive as much or more indirect benefit from said lateral sewers as the densely populated part of the district will from that part of the main sewer which runs through or near plaintiffs' property; and if it is a hardship upon the plaintiffs to have to contribute to the payment of the main sewer before they connect their lateral sewers with it, then they are more than compensated therefor by receiving the benefits of the lateral sewers located above, as previously mentioned. The cost of the construction of the latter, according to plaintiffs' own figures, is far in excess of the cost of the construction of the main sewer; this throws some light upon the relative benefits received by each section of the district. In that way plaintiffs receive the benefits of the main and lateral sewers located above them, without paying one penny therefor, and when they construct their lateral sewers and connect them with the main sewer in question, then the entire district will be completely drained with equal benefits and equal cost; if any difference in cost, it is in favor of the plaintiffs, because they will not be required to construct their part of the lateral sewers until the necessity of that section of the district demands it.

The law does not require all of the lateral sewers of a drainage district to be constructed at the same time; they may be constructed as the necessities therefor may demand. [City of St. Joseph to use of Gibson v. Owen, 110 Mo. 445.]

In fact, the city has no authority to construct them until such necessities do arise; otherwise the ordinance would be unreasonable, unjust and oppressive.

But should it be conceded that the cost and benefits are not exactly equal, that, however, would not invalidate the proceedings or the tax-bills issued in payment of the improvements—this not being an Utopian government, exact equality in taxation cannot be obtained, approximate equality is all the law requires, and in my opinion, that has been accomplished in this case. Especially is that true since that portion of the city situate on the elevation above the property of plaintiffs is thickly populated and is at present in need of lateral sewers, and must, if not already built, be constructed at once, and the burden thereof must be borne by that part of the district only, and not contributed to by the plaintiffs.

II. Counsel for plaintiffs also raise the question as to whether or not the extension of the city limits embracing their lands was illegal on account of lack of notice of the election held to extend the limits.

The evidence upon this question is not sufficient to justify the court in giving it serious consideration; besides that, the contention seems to be too stale to justify consideration, fifteen years having elapsed since the extension was made.

In the case of *State ex rel. v. Westport*, 116 Mo. 582, where the delay had been only twelve years, this court refused to consider the question in a direct proceeding by *quo warranto*, holding the parties had slept too long on their rights, if any they had, and were therefore estopped.

The case of *State v. Leatherman*, 38 Ark. 81, is to the same effect.

In *Perkins v. Fielding*, 119 Mo. 149, this court held that the validity of an ordinance could not be collaterally attacked on the ground the council was not legally constituted.

There is no merit in this contention.

There are other minor questions presented, but they do not affect a proper disposition of the case.

For the reasons stated, the judgment of the circuit court is affirmed. All concur, *Bond, P. J.*, in result.

HARRIETT U. DALTON et al. v. WILLIAM SIMPSON
et al; MARY SIMPSON, Appellant.

Division One, March 12, 1917.

1. **HOMESTEAD: Money in Lieu of Dwelling.** The existence of the home, and not the money which represents its value, is the foundation of the homestead statutes. They refer only to the dwelling house for the family and the surrounding soil from which the sustenance of the home is to spring.
2. ———: **In Partition: Governed by Section 6713: Power of Court.** Since the Partition Act is silent as to homesteads, resort must be made to section 6713, Revised Statutes 1909, which is a part of the Homestead Statute, whenever lands in which a homestead exists are brought into partition. Under that statute the only power the court has is to sever it from the balance of the real estate sought to be partitioned.
3. ———: ———: **Section 6714.** The Legislature meant, by Sec. 6714, R. S. 1909, which authorizes the sale of the homestead in certain contingencies and which is the only provision of law by which it is possible for the courts to deprive the widow and minors of their homestead, to guard their rights with care. It cannot be used as a device by which adult heirs and other plaintiffs in partition may swallow the homestead or extinguish it by relegating the widow and minors to the value of the homestead or to the net income arising from such value.
4. ———: **Not Subject to Partition.** A homestead as such is not subject to partition. If it can be severed and set apart from the rest of the real estate, it cannot be sold at the partition sale.
5. **PARTITION: Severance and Subsequent Sale of Homestead: Bill of Exceptions.** Where the proceedings in a partition suit have been regular up to the time the report of the commissioners appointed to admeasure and set off the homestead has been filed, the court cannot thereafter order the homestead sold and the value thereof placed in the hands of a trustee for the use of the widow and minors; and if such an order is embodied in a judgment subsequently rendered ordering distribution, it as well as the judgment are for review on appeal, as matters of record proper, and a bill of exceptions is not necessary.

Appeal from St. Charles Circuit Court.—*Hon. Edgar B. Woolfolk*, Judge.

REVERSED AND REMANDED (*with directions*.)

C. W. Wilson and J. W. Wilson for appellant.

(1) The widow of the deceased homesteader was and is entitled to have her homestead allotted to her in kind, inasmuch as it clearly appears that the homestead was and can be allotted in a compact body, leaving the residue of the land in a compact body of 50.23 acres. R. S. 1909, sec. 6708-6714; *Schaeffer v. Beldsmeier*, 9 Mo. App. 444. (2) The only condition under which the statute authorizes the court to order the homestead sold, is in the case where the dwelling house, outbuildings, and lands in connection therewith, in which a homestead shall exist, shall exceed the value provided by the statute, and a severance of the homestead would greatly depreciate the value of the residue or be a great inconvenience to the parties interested, and it appears that such homestead cannot be occupied in severalty without great inconvenience to the parties interested in the homestead or the residue. R. S. 1909, sec. 6714; *Schaeffer v. Beldsmeier*, 9 Mo. App. 444. (3) If the homestead, as in the case at bar, can be occupied in severalty with perfect convenience and the residue can be used in severalty with perfect convenience, the mere fact that the land as a whole would sell for a little more if sold as one tract than it would bring if sold in two separate tracts, does not authorize the sale of the homestead against the will of the homesteader. The statute plainly bases the right to order the sale upon the proposition that it must "appear that the homestead cannot be occupied in severalty, without great inconvenience to the parties interested in the homestead or in such residue." (4) But if section 6714 applies to this case, then, if the court found the homestead could not be occupied in severalty, it should have fixed the value of the residue and afforded the homesteader the opportunity to pay the price of the residue, which she asked to be done. R. S. 1909, sec. 6714.

W. R. Dalton and B. H. Dyer for respondents.

(1) Where a homestead is a part only of an estate held in common it is subject to a proceeding in partition.

Beckner v. McLinn, 107 Mo. 289; Secs. 6714, 2559, R. S. 1909. (2) A motion for new trial or a motion to modify a decree must be filed within four days and if filed after four days, and especially if not filed until after the adjournment of the term at which the trial was had, it comes too late to perform any office in the case and no exceptions can be predicated thereupon. Smith v. Smith, 192 Mo. App. 105; Windes v. Earp, 150 Mo. 600. (3) Appellant having failed to file a motion for a new trial upon the rendering of the interlocutory judgment of partition and order of sale made at the June term, 1913, or to save her exceptions to such interlocutory judgment by a term bill of exceptions, such interlocutory judgment became final and is immune from attack at a subsequent term of the court. Windes v. Earp, 150 Mo. 605; Richardson v. Schuyler County, 156 Mo. 407. (4) Appellant having acquiesced in the ruling of the court rendered at the June term, 1913, until the succeeding November term thereof, and having failed to except to the interlocutory judgment entered at the June term, 1913, on August 8, 1913, and to save her exceptions by a timely bill of exceptions, will be held to have abandoned her exceptions and to have thereby contributed to the final judgment rendered in the case, and her attack on the interlocutory judgment made for the first time at the next succeeding term comes too late to have any effect upon the interlocutory judgment. Blanchard v. Dorman, 236 Mo. 435; Simpson v. Scroggins, 182 Mo. 560; Reineman v. Larkin, 222 Mo. 156; St. Louis v. Lawton, 189 Mo. 474; State v. Larew, 191 Mo. 192; Windes v. Earp, 150 Mo. 600; Richardson v. Schuyler County, 156 Mo. 407; Moran v. Stewart, 246 Mo. 462; Mexico v. Barnes, 158 Mo. App. 612; Smith v. Baer, 166 Mo. 392; Asphalt Co. v. Ullmann, 137 Mo. 543; Bohn v. Lucks, 165 Mo. App. 701. (5) The statute authorizing the court to deal with the homestead and to order a sale of the whole premises if the case require it, and to apportion the proceeds between the parties and to make all such orders in the premises as shall be equitable and just, is an ample and full investiture of the

Dalton v. Simpson.

court with authority and jurisdiction to do precisely what the court has ordered and done in this case. *Beckner v. McLinn*, 107 Mo. 277; Secs. 6714, 6715, R. S. 1909.

BROWN, C.—This is a partition for about 91 acres of ground in St. Charles County, Missouri. Originally Harriet U. Dalton, John C. Brown and Lucy L. Brown were plaintiffs, and William Simpson, Seony Simpson, Frank Simpson, Bertha Simpson, Joseph Simpson, Lora Simpson and Beulah Simpson were defendants. The petition is as follows:

“Plaintiffs state that they and defendants are the owners in fee in common and in possession of the following described real estate in St. Charles County and State of Missouri, to-wit:”

(Here follows a description by metes and bounds of the land involved which constitutes a compact contiguous tract, although somewhat irregular in shape. The petition then proceeds):

“That plaintiff Harriet U. Dalton, is the owner of an undivided three-ninths interest in and to said real estate; that plaintiff John C. Brown is the owner of an undivided one-ninth interest in and to said real estate, subject to the inchoate right of dower of his wife, Lucy L. Brown; that plaintiff Lucy L. Brown is the wife of said John C. Brown and has an inchoate right of dower in the first two tracts above described; that defendant William Simpson is the owner of an undivided one-ninth interest in said real estate subject to the inchoate right of dower in his wife, Seony Simpson; that the defendant Seony Simpson is the wife of said William Simpson and has an inchoate right of dower in the first two tracts above described; that defendant Frank Simpson is the owner of an undivided one-ninth interest in and to said real estate, subject to the inchoate right of dower in his wife, Bertha Simpson; that Bertha Simpson is the wife of said Frank Simpson and has an inchoate right of dower in the first two tracts above described; that Joseph Simpson, Lora Simpson and Beulah Simpson, each own an undivided one-ninth interest in said real

Dalton v. Simpson.

estate; that said Frank Simpson, Joseph Simpson, Lora Simpson and Beulah Simpson are all minors and have no legal guardian or curators; that said real estate is not susceptible of division in kind without great detriment to the interest of the parties owning the same. Plaintiffs ask for the appointment of a guardian *ad litem* for said minors to look after their interest herein. Wherefore plaintiffs pray the court for a judgment for partition for said real estate in accordance with the interests of the respective parties hereto as herein set out and for an order for the sale of said land for the purpose of partition and for the distribution of the proceeds of such sale to the parties hereto according to their respective rights therein, and for such other and further orders and judgments as to the court may seem just and right."

The defendants were duly summoned at the November term, 1912, of the St. Charles Circuit Court, during which Osmund Haenssler, Esq., was appointed guardian *ad litem* of the four infants and answered as follows: "That he has not sufficient knowledge of the matters alleged in plaintiffs' petition either to admit or deny the same and asks that plaintiffs be required to make strict proof of the allegations and averments in their petition contained."

During the same term and on December 24, 1912, said cause was called and submitted on the pleadings and evidence, and the court entered its judgment defining the rights of the parties and for partition and ordered that the property be sold by the sheriff at the following March term, which was done on March 4th at public vendue for cash to John C. Brown, the highest bidder, for \$1250; the thirty-five-acre tract last described in the petition being separately sold subject to the homestead rights of the widow and minor children for \$110, and the remainder being separately sold to the same bidder for \$1140. The sheriff made his report at the same term. On the 12th of the same month the appellant, Mary Simpson, widow of Wiley D. Simpson, filed in the court her motion to be made a party and to set aside the sale and for the assignment of homestead and dower, which

was sustained, the sale set aside, as was also the interlocutory judgment rendered at the previous term, that proper steps might be taken to assign the homestead and dower. A new interlocutory judgment was entered adjudging that the defendants Mary Simpson, widow, and Frank Simpson, Joseph Simpson, Lora Simpson and Beulah Simpson, the minor children of Wiley D. Simpson, deceased, were entitled to a homestead in the property described in the petition, and appointing commissioners to set it out, and to make report of their proceedings at the following June term. They proceeded to the performance of that duty, setting off for that purpose forty acres from the south side of the tract in a compact body on which was situated the dwelling house and appurtenances of the deceased owner, in which the widow and minor children resided at the time, and valued it at \$1500. They filed their report on June 28th, and thereafter, at the same term, and on the 5th day of August, 1913, while the court was still in session, the plaintiffs filed their exceptions and objections thereto, which omitting the caption and signature is as follows:

“Come now the above named plaintiffs and object and except to the report of the commissioners appointed herein, filed in this cause on June 25, 1913, and move the court to disapprove said report and reject the same, and for ground for their objections to said report plaintiffs state that said commissioners in their said report have allotted and set apart to defendant Mary Simpson, widow, and Frank Simpson, Joseph Simpson, Beulah Simpson and Lora Simpson, minors, as homestead, 40 acres of land, as same is described in said report; that said 40 acres of land so set apart as homestead to said named defendants greatly exceeds in value the homestead to which said defendants are lawfully entitled, said 40 acres being not less than \$2000 in value, whereas said defendants are entitled to a homestead not to exceed the sum of \$1500 in value; that to set apart to said named defendants a homestead in kind out of the lands described in plaintiffs’ petition and especially to set apart to said named defendants the 40 acres of land described in said

Dalton v. Simpson.

report as a homestead, will greatly depreciate the value of the residue of the premises described in plaintiffs' petition, which are the lands sought to be partitioned by these proceedings, and will result in great inconvenience to the parties interested in such residue; that if the whole of the lands described in plaintiffs' petition were sold as one tract they would bring the sum of \$3250, that being the reasonable market value of the said lands taken as a single tract of 90 acres, more or less, but that if the 40 acres described in the commissioners' said report and set apart by them as a homestead be severed from the residue of said premises and said residue be sold separately said residue of 50 acres will be so injuriously affected by such severance of a homestead that the same will not bring more than \$750.

"Wherefore plaintiffs pray the court, the above stated facts being considered, to set aside its interlocutory judgment entered in this cause ordering that a homestead in kind be set apart to defendants Mary Simpson, Frank Simpson, Joseph Simpson, Beulah Simpson and Lora Simpson and that the court now order the whole of the lands and premises described in plaintiffs' petition to be sold intact as one piece without the setting apart of a homestead in kind to said named defendants and that a trustee be appointed by the court to collect and receive the value of such homestead in money, to-wit, the sum of fifteen hundred dollars, out of the proceeds of the sale of said real estate, and that said trustee be empowered to invest or loan out the said sum of money and be ordered to pay over the income to be derived from the same to said named defendants during the widowhood of defendant Mary Simpson and the minority of defendants Frank Simpson, Joseph Simpson, Beulah Simpson and Lora Simpson, and that all the balance of said proceeds of sale be distributed among plaintiffs and defendants according to their respective rights in said real estate."

On the 8th day of August, 1913, said objections and exceptions came on to be heard, and the court, after hearing evidence, sustained them, set aside its last interloc-

utory judgment and entered a new one directing the sale of the land as a whole to be made at the November term, 1913, to which the appellant excepted, but neither filed nor took leave to file any bill of exceptions during that term.

At the said November term and on the 3rd day of November, 1913, appellant filed her motion to set aside the said interlocutory judgment of August 8, 1913, and to prohibit the sheriff from making sale of the premises thereon because: (1) it was contrary to law and the provisions of the statute; (2) it appears from the record and report of the commissioners that the homestead was susceptible of allotment and separate use without inconvenience to the occupant, either of the homestead or residue of the land, and without material depreciation in value of the residue; (3) the sale of the whole tract as a single parcel was ordered without ascertaining and fixing the value of the residue and according the owner of the homestead the option and privilege of paying the ascertained value of such residue as provided by law; (4) it is illegal, unfair, inequitable and unjust in arbitrarily and unconditionally requiring the whole tract to be sold as one body without permitting the offering of the homestead tract and residue separately, so as to determine by actual experience whether it would sell for more as one body than in separate tracts; (5) because the court did not give appellant the option and privilege of paying the value of the residue and retaining the homestead as required by law; (6) the judgment does not permit the proceeds of the homestead to be invested in the purchase of another homestead. The foregoing objections are set out with great detail in the statement of facts supporting them, and the motion concludes as follows: "And the said defendant, Mary Simpson, widow and homesteader as aforesaid, prays the court for an order setting aside the said interlocutory decree and order of sale, and suspending the sale of the said property, until the further order of this court; that, upon a hearing of the facts, this court confirm and establish the report of commissioners herein filed, setting apart the said homestead in

kind; or, if the court shall find that the homestead, as set off by said commissioners, exceeds in value the sum of fifteen hundred dollars, it appoint other commissioners to set off such homestead and report their proceedings to this court; that, if upon a full hearing of the facts, the court shall be of the opinion that a homestead cannot be set off in kind and occupied in severalty without greatly depreciating in value the residue of the said property, it proceed to hear the necessary evidence, and ascertain, determine, and fix the value of such residue, and give this defendant, the homesteader, the option and opportunity of paying to the other parties, or into court for their use, the value of such residue, and upon such payment, by its decree, vest the full title in and to such residue in this defendant; that, in the event the court finds that a homestead cannot be set aside in kind and occupied in severalty without greatly depreciating in value the residue of the said property, and that, after it determines and fixes the value of such residue, this defendant fails or refuses to pay such value and take the property and the court orders its sale, the court provide and direct, in its order, not only that the said property be offered for sale as one tract or body, but also that it direct that, at such sale, it be offered in separate tracts, and if it appear, on such sale, that the residue and the homestead shall sell for approximately as much when offered in separate tracts as when offered as one body, then the allotment in kind be confirmed and the proceeds of the residue be distributed to the parties according to their several interests; that, if the entire property be sold and conveyed, the court, in its order and decree, provide and authorize the fifteen hundred dollars, the value of the homestead, to be invested in the purchase and acquisition of another homestead for the use, occupancy, and enjoyment of the parties, and that this court, in its decree, make all such orders as shall be equitable and needful in the premises."

This motion came on to be heard on the next day (November 4th), was overruled, and appellant duly excepted. The sheriff proceeded on the same day to sell

the land at public sale, and the plaintiff Harriet U. Dalton being the highest bidder therefor at \$2238.50 it was sold to her for that price.

The sheriff reported this sale to the court on November 10th and on the 13th day of the same month, while the court was still in session the appellant filed her motion to set aside the last sale and to set aside and modify the interlocutory decree of August 8, 1913, and confirm the report of the commissioners theretofore made, setting out the homestead. This motion, in addition to repeating substantially the grounds set forth in the motion previously filed, and determined November 4, 1913, setting up inadequacy of the consideration received, and the fact that the last sale had demonstrated that the setting out of the homestead would not depreciate, for purposes of sale, the value of the residue of the land, which had brought more at the separate sale first held than at the last sale when the entire tract was sold without division. The motion concluded as follows:

"This defendant prays that said report of sale and said sale be set aside; that the order of sale and judgment of August 8, 1913, herein be set aside and that the report of commissioners heretofore herein filed allotting and setting off a homestead in kind, be approved and confirmed; or if the court be of the opinion that the value of the homestead as allotted in said report exceed \$1500, it appoint new commissioners to set off a homestead in kind; that the court then order the residue of said land to be sold by the sheriff, so that full title to the same may be given, but in its order fix the value of said residue and give this defendant, the homesteader, an opportunity to buy the same at the appraised value, if it does not bring more at such sale, and this defendant offers to take said residue upon a full title thereto being made to her at the price and sum of \$850; or if it appear more equitable and just in the judgment of the court, that this court set aside the said sale in so far as the homestead allotted in kind by the commissioners is concerned and confirm the report of commissioners, allotting the homestead in kind, but confirm the sale as to

Dalton v. Simpson.

the residue and order a deed for said residue to be made to the purchaser, John C. Brown, plaintiff herein, upon the payment to the sheriff of \$755.75, the value of said residue, as shown by deducting the value of the homestead from the total price.

"Defendant asks for all other just and proper orders in the premises."

Thereafter at the same term this motion came on to be heard and was overruled, to which the appellant excepted. The court thereupon approved and confirmed the report of sale and made its final order of distribution, and appellant duly excepted. During the hearing of the motion last mentioned the report of the first sale already referred to was introduced in evidence, as well as the report of the commissioners thereafter appointed to set out the homestead. After motion for a new trial filed in due time and overruled this appeal was taken from the final judgment.

I. The elaborate argument of the respondents is devoted entirely to the question whether we have before us in the bill of exceptions which constitutes a part of the record, the facts necessary to the consideration of this case upon its real merits. This, in the view we take, seems unimportant. The reasons for our conclusions in this respect will sufficiently appear as we proceed to notice what seem to us to be the real questions in the controversy.

**Bill of
Exceptions.**

II. The suit was originally instituted to partition ninety acres of land of which Wiley D. Simpson died seized, upon which was situated the dwelling house and appurtenances where he then resided with his wife and children, four of the latter being minors at the time of the trial. The parties, plaintiffs and defendants, were his children or their representatives in interest. The widow who, with his four minor children, was living in the family residence, was not made a party, the petition being framed upon the theory that thirty-five acres of the land, including the dwelling, had been set off to her and the minors as a homestead by the probate court. and

**Sale of
Homestead
in Partition.**

the sale of this tract, subject to the homestead, together with the remaining fifty-five acres, was asked.

The suit was returnable to the November term, 1912, of the St. Charles Circuit Court, at which an interlocutory judgment was entered defining the interests of the parties according to the petition and ordering the sale of all the land subject to the assumed interests of the widow and minors in the thirty-five acre tract. The sheriff sold the land to the plaintiff John C. Brown for \$1250 subject to the homestead interests, and upon the coming in of his report at the March term, 1913, the appellant filed her motion to be made a party and to have the homestead set off, which had not in fact been done. She was admitted as a defendant, the sale and interlocutory decree were set aside, and a new interlocutory decree entered appointing commissioners to set out the homestead. They set off forty acres of the land, including the dwelling, and reported at the June term.

It was then that this trouble began. The plaintiffs filed exceptions to the report, asking that the interlocutory decree entered at the March term be set aside; that the entire land be sold in a single body; that \$1500 of the proceeds be placed in the hands of a trustee, to be appointed, to invest the same and pay the income to the parties who would from time to time be entitled to the homestead. This motion was sustained, the report of the commissioners set aside and a resale ordered as asked, and the question now presented is the propriety and validity of that decree.

Before the sale under this last order at the November term the appellant filed her motion to prevent it, and after the sale filed a similar motion to have it set aside. In both these motions she asked for the assignment of her homestead.

The homestead laws are *sui generis*. Their object is to preserve inviolate a modest home for the family, which is the potential unit of civilization. They refer only to the roof that covers it, and the surrounding soil from which its sustenance is assumed to spring. When these are converted into money its existence ceases, and

Dalton v. Simpson.

can only be restored by its reconversion into house and land. This principle is the stone which is the head of the corner of all statutory constructions relating to the subject. The existence of the home and not of the money which represents its value is the foundation on which such statutes stand. They must be construed in harmony with that purpose, and must be carefully scrutinized before they can be held to intend its defeat.

Our own statutes leave no room for uncertainty in this respect. The article relating to partition, under which this suit was brought, describes with great particularity the estates subject to its provisions, but is silent as to the homestead (R. S. 1909, sec. 2559); so we must go to the homestead law for information as to the duty and powers of the court with reference to it in such proceedings, and find them concentrated in section 6713 of our present Revision. It is as follows:

“Whenever, in any case not in this chapter otherwise provided for, it shall become necessary, in any proceeding at law or in equity, to sever or set out any homestead from other real estate, the court in which such proceedings shall be pending may appoint three commissioners to appraise and set out such homestead, which commissioners, after being sworn to the faithful discharge of their duties, shall appraise and set out such homestead in the same manner as is provided in this chapter for setting out homesteads in case of the levy of execution, and make report of their doings to such court, which report shall be confirmed by such court, unless good cause be shown to the contrary; and a record thereof shall be made in the records of lands, where a deed of such homestead would by law be required to be reported, which shall operate as a severance of such homestead from such other real estate.”

This court has not left us without authority that this section means what it says, no more, no less. In *Simpson v. Scroggins*, 182 Mo. 560, 571, referring to it we said:

“Doubtless in this partition proceeding, when the court ascertained the existence of a homestead, it pro-

ceeded to sever it from the balance of the real estate sought to be partitioned, in pursuance to the provisions of the foregoing section. In this character of proceeding, that was the only power the court was authorized to exercise."

In the later case of *Brewington v. Brewington*, 211 Mo. 48, the heirs asked for the sale in partition of the homestead in connection with contiguous lands, alleging that the value of both would be greatly depreciated by a separate sale. This the trial court refused, holding that the homestead was not subject to partition *in that action*, and this court in sustaining its judgment said: "That a homestead may be set out by a partition proceeding, no one questions; but in this case the homestead has been set out and the question is whether, having been set out, it may be partitioned among the heirs prior to the youngest attaining its majority?"

"That a homestead, as such, is not subject to partition results from the inherent character of the estate and the purpose it subserves under the policy of our laws. [*Rhorer v. Brockhage*, 86 Mo. 544; *Simpson v. Scroggins*, 182 Mo. l. c. 571, 574; *Quail v. Lomas*, 200 Mo. l. c. 687.]"

That case coincides in all respects with the one before us. It comments on *Beckner v. McLinn*, 107 Mo. 277, and so far as the opinion in that case implies a contrary doctrine, necessarily overrules it.

The Legislature in the next section (6714) gives emphasis to its intention to limit the power of the court in partition cases, as well as in all other proceedings in which other interests are involved, to meddle with the homestead otherwise than to detach it in kind from the subject of the litigation, so that the interests of the widow and children in its preservation and devotion to the beneficent purpose for which it was created might not be smothered among interlocking issues. It foresaw that circumstances might arise in which the protection of these interests would require the sale of the property, and section 6714 was enacted to safely provide for such contingencies. It provides that: "Whenever any dwell-

Dalton v. Simpson.

ing house, outbuilding and the land in connection therewith, in which a homestead shall exist, shall exceed the respective value mentioned in section 6704, and a severance of such homestead would greatly depreciate the value of the residue of the premises, or be of great inconvenience to the parties interested either in such residue or in such homestead, either party may apply to the circuit court by petition, setting forth the facts, for relief; and upon the hearing of such petition, if it shall appear that such homestead cannot be occupied in severalty without great inconvenience to the parties interested in such homestead or in such residue, the court may order such homestead to be transferred to such other parties, and the payment of the value of the homestead interest to the owner thereof; or, at the option of such owner, may order such other parties to transfer such residue to him, and order him thereupon to pay such other parties the value thereof, to be fixed by the court; or, if the case require it, the court may order a sale of the whole premises, and apportion the proceeds between the parties; and such court may make all such orders in the premises as shall be equitable and needful."

This is the only provision of the law by which it is possible for the court to deprive the widow and minor children of the deceased householder of the title vested in them by the provisions of section 6708, and it guards their rights with care.

There are many cases we can imagine in which this provision may be necessary and useful, but we find nothing in it that indicates the intention of the Legislature to nullify the purpose of the law by forcing a sale because contiguous lands may have a sentimental value from their proximity to a cottage with its curtilage and buildings. We can imagine that if the cottage itself represented the full measure of value allowed for a homestead, it might be just and reasonable to give the widow and children an opportunity to purchase these appendages, which would have their real value from their connection with a home; or, if she should be unable to do so, to give the persons to whom they would go an op-

portunity to purchase the cottage which, as a home, would give them their value; and the Legislature in the section we have just quoted has shown its foresight with respect to this and other similar conditions that might arise by authorizing a suit in which the widow and children shall have the privilege or "option" to save their home by the purchase of the curtilage. This must be done in a proceeding by petition for such relief, "setting forth the facts," and cannot be made a device by which the plaintiff in a partition suit may swallow the homestead as is attempted in this case. This widow availed herself of every opportunity to deny the power of the court to do this and to demand her rights. She offered to purchase the entire farm outside the homestead, either at a valuation to be fixed by the court, or at a price to be ascertained by actual experiment. On what principle the court, assuming to act under the provisions of section 6714, did this, does not appear. The reason which actuated it in finally approving a sale by which the outside lands, sold in connection with the homestead, brought less than had been realized in a separate sale, does not appear, nor do counsel attempt to justify it in argument. The judgment stands here simply as the culmination of an attempt to bar the homestead right of the widow and relegate her to a net income of perhaps seven dollars per month instead of the roof and ground to which she had the right to look for shelter and sustenance for herself and the children. It must look to the law alone, unaided by any principle of equity, for success.

III. It is true, as contended by respondent, that all matters of exception taken upon the trial of a partition case resulting in the "judgment that partition be made," and declaring "the rights, titles and interests of the parties," must, like all other exceptions, be saved by bill or leave to file a bill during the same term. [Blanchard v. Dorman, 236 Mo. 416, and cases cited.] It is equally true that the interlocutory judgment is a part of the record which we are called

**Errors
Manifest
By Record.**

upon to examine, and of the judgment which must be affirmed, reversed or modified by this court. Had the appeal been taken directly from it the question would have been presented whether it is sustained by the record proper before this court; and the same question arises in this appeal from the final judgment of which it is a part, and which is dependent upon it for support.

The petition discloses on its face the facts necessary to determine that question. It states that a homestead had been assigned from the very land in question, but does not ask for its sale, nor is the appellant made a party. In the condition of the pleadings as they then stood no foundation was laid for either the setting off of the homestead or for its sale, nor were the parties present to authorize such proceedings. At the March term these conditions were changed by the coming in of the appellant as a party, the setting aside of the original judgment, and the entry of the new judgment that the homestead be set off to her and the minors, which was done by the commissioners appointed for that purpose, who reported at the June term.

Up to that point all the proceedings had been regular so far as the interest of the appellant is concerned. She had got what she asked and was entitled to, and the action of the court up to the time of the filing of the report should stand. The motion then filed by the plaintiffs set out fully the right of appellant and the children to the homestead, and thus, as we have seen in the preceding paragraph, negatived the right of the court to make the order of sale, which was therefore irregular and erroneous upon the record proper and should be set aside. For this purpose it was under the control of the trial court until, with its record infirmities, it became merged in the final judgment we are now reviewing. [Aull v. Day, 133 Mo. 337; Fogle v. Pindell, 248 Mo. 65, 71-2; Davidson v. Real Estate Co., 249 Mo. 474, 493-6.] The case last cited is rich in the citation of authorities directly applicable here. The question here is whether the final judgment is supported by the record upon which

it was entered and upon which it must stand for its regularity.

It is unnecessary for us to decide whether or not, had this motion been a petition under section 6714, it would have been insufficient on the ground that it stated no facts to support the conclusion in which it was based. It is a proceeding in this case, and must stand or fall accordingly.

Having arrived at this conclusion it is unnecessary to deal at this time with the subsequent proceedings of the trial court as shown by the record, including the bill of exceptions taken during the November term, 1913.

We therefore reverse the judgment of the St. Charles Circuit Court, and remand the cause to that court with directions that all orders and judgments in said cause made subsequently to the coming in and filing of the report of the commissioners appointed by said court at its March term, 1910, to admeasure and set off to the appellant and minor children of Wiley D. Simpson a homestead in the premises therein described, be set aside, so that said cause shall stand in said court upon said report, with leave to the parties respectively to proceed further with reference thereto as they shall be advised; and that the court proceed to final judgment in said cause in accordance with the views herein stated.

Railey, C., concurs.

PER CURIAM.—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All of the judges concur.

**BYRD N. McKINNEY et al., Appellants, v. FIDELITY
MUTUAL INSURANCE COMPANY.****Division One, March 12, 1917.**

1. **INSURANCE: Change of Beneficiaries: By Contract.** A provision inserted in a policy belonging to the class of insurance wherein the rights of the beneficiaries are vested, which entitles the insured to change them and to divest them of its proceeds, is as broad as its terms and no broader, and must be construed according to the terms expressing it in a given case.
2. ———: ———: **To What Insurance Applicable.** The right to change the beneficiary named in a policy, whether as an incident to fraternal-beneficiary insurance or as one resting in contract expressed in an ordinary-life policy, is equally efficacious, and the power to exercise it is measured by the language on which it is founded. Whether the right arises by convention or from the nature of the insurance, the beneficiary to be affected by its exercise has a conditional interest only in the policy proceeds, while the power to change such beneficiary continues to exist.
3. ———: ———: **Only Incidentally Applicable.** Where no change was made in the beneficiaries designated when the policy was issued, the terms of the provision authorizing the insured to change them need not be considered further than as affording incidental support for what was actually done by the insured in the delivery to him of a paid-up policy upon a surrender of the original policy.
4. ———: **Statutes as Part of Contract.** The statutes governing the business of a foreign insurance company licensed to do business in this State are as much a part of an ordinary-life policy written by it as if the language of the statutes had been inserted in the policy as a part of the agreement of the parties.
5. ———: **Surrender for Paid-Up Policy: Without Consent of Beneficiaries: Legal Holder.** Since the statutes say that the "legal holder" of a non-forfeitable ordinary-life policy may demand a paid-up policy for an amount computed by a statutory plan, and that the "legal holder" of the policy may himself surrender the policy and thus avoid its self-enforcing provisions for extended insurance, the insured, who within the meaning of such statutes is the "legal holder," may, without the consent of the beneficiaries, surrender a policy upon which he has paid three or more annual premiums, and in lieu thereof receive a paid-up policy for the statutory sum, and that sum being both in accordance with the

270 Mo.—20

McKinney v. Insurance Co.

statute and the stipulations of the policy the company by paying it may be discharged from any further obligations under the policy.

6. ———: ———: **Separate Estate of Wife.** The statute (Sec. 6944, R. S. 1909) which provides that an insurance policy made payable to the wife of the insured "shall inure to her separate benefit, independently of the creditors" of the husband, was designed to make whatever should come to her upon the payment of the insurance her separate estate and to exempt it from the claims of the creditors of her deceased husband; it does not inhibit the husband from surrendering a policy which names her as beneficiary, and accepting a paid-up policy in lieu thereof.

Appeal from St. Louis City Circuit Court.—*Hon. George C. Hitchcock*, Judge.

AFFIRMED.

Clarence F. Westcoat and *F. H. Bacon* for appellants.

The only question involved in this appeal is whether or not under the terms of the original policy issued to Charles S. McKinney, and payable to plaintiffs, reserving to said McKinney the power, subject to the approval of the company, to change the beneficiary named therein, he could cancel and surrender said policy without the consent of the beneficiaries. (1) Up to a comparatively recent time policies of regular life insurance contained no reservation of the right to change the beneficiary and without that reservation it is a universally admitted rule of law that such policies confer upon the beneficiary a vested interest and property which cannot be divested without their consent. *Blum v. Ins. Co.*, 197 Mo. 513; *U. S. Casualty Co. v. Kacer*, 169 Mo. 301; *Bank v. Hume*, 128 U. S. 795; *Holmes v. Gilman*, 138 N. Y. 382. (2) The contracts of the fraternal beneficiary societies give the member the right to change the beneficiary, and this fact undoubtedly led the regular, or old line, life insurance companies to insert in their policies the provision permitting the change of beneficiary. From the similarity of the contracts in this respect some courts have been led to the conclusion that the insured, where the right to change the beneficiary was reserved, had an absolute

McKinney v. Insurance Co.

control over the policy, forgetful of the fact that the contracts are very dissimilar. *State ex rel. v. Vandiver*, 213 Mo. 187; *Westerman v. Supreme Lodge K. P.*, 196 Mo. 670; *Commonwealth v. Equitable Beneficial Assn.*, 137 Pa. St. 412; *Mut. Ben. Soc. v. Burkhart*, 110 Ind. 189; *Grigsby v. Russell*, 222 U. S. 149. (3) Although the member of a fraternal society has the right to change the beneficiary, so that it is said that the beneficiary has simply an expectancy, a conditional vested interest, such beneficiary can invoke the conditions required for change of beneficiary and insist that they be observed. Their rights can only be terminated in the manner specified in the contract. It is true this is modified by the holding that the society may waive the requirement of the laws of the order as to change of beneficiary and if the certificate is surrendered and a new one is issued, the beneficiary is bound thereby; otherwise, the principle is correctly stated. *Finnell v. Franklin*, 55 Colo. 156; *A. O. U. W. v. McFadden*, 213 Mo. 269, affirming 114 Mo. App. 191; *Abeles v. Ackley*, 133 Mo. App. 594; *Johnson v. Ins. Co.*, 56 Colo. 178. (4) The policy sued on constituted an executed, voluntary settlement on the wife and daughter of McKinney, subject only to one reservation, namely, the power to revoke the designation of them as beneficiaries and appoint new beneficiaries. This right conferred upon McKinney no property in the benefit but was a power only, pure and simple, subject to all the well settled rules of law governing powers. *Mut. Ben. Soc. v. Clendinen*, 44 Md. 433; *Arthur v. Odd Fellow's Ben. Assn.*, 29 Ohio St. 553; *Hellenberg v. Dist. No. 1, I. O. B. B.*, 94 N. Y. 580; *Abeles v. Ackley*, 133 Mo. App. 594. (5) McKinney had no property in this insurance under the contract, but simply the power to change the beneficiary, and such right creates no property in the subject of the power, that is, in the insurance or in the policy. *Abeles v. Ackley*, 133 Mo. App. 594; *Slaughter v. Grand Lodge*, 68 So. (Ala.) 367; *Smith v. Hatke*, 78 S. E. (Va.) 584; *Modern Woodmen v. Headle*, 90 Atl. (Vt.) 893; *Sabin v. Phinney*, 134 N. Y. 428; *Grant v. Faires*, 97 Atl. (Pa.) 1060; 31 Cyc. 1038; Ex.

p. Gilchrist, 17 Q. B. D. 521; Garland v. Smith, 164 Mo. 15; Price v. Courtney, 87 Mo. 387. (6) While the interest of plaintiffs in the policy sued on might in a loose way be called an expectancy, still they had a vested conditional interest and this interest could only be divested in the manner pointed out in the contract and in no other way. The insured could not surrender the policy, that is dispose of the property, without the consent of the beneficiaries. Vance on Insurance, p. 399, citing Hopkins v. Heist, 92 Ky. 327; Richards on Insurance, sec. 58, citing Conway v. Supreme Council, 131 Cal. 437; Ins. Co. v. Clinton, 76 N. J. Eq. 4; Sullivan v. Maroney, 76 N. J. Eq. 104; Ins. Co. v. McGinnis, 180 Ind. 9; McCutchen v. Townsend, 127 Ky. 230; Holder v. Ins. Co., 77 S. C. 299; Roberts v. Ins. Co., 85 S. E. (Ga.) 1043; Deal v. Deal, 87 S. C. 395; Blum v. Ins. Co., 197 Mo. 513; Christman v. Christman, 157 N. W. (Wis.) 1099. (7) This policy was issued in Missouri and the statutes of the State form part of it. It is a serious question whether under our statute the provision in a policy, payable to the wife of the insured, that he can change the beneficiary (except in case of the death, or divorcement, of the wife), is not void. In re Orear, 111 C. C. A. 150, 189 Fed. 888.

Jones, Hocker, Sullivan & Angert and James C. Jones, Jr. for respondent.

(1) Where a policy of insurance reserves to the insured the right to change the beneficiary, the interest of such beneficiary during the lifetime of the insured is a contingent and not a vested interest; such a policy when issued becomes the property of the insured; the insured is the legal holder thereof and the ownership and control of the policy is in him. United States Cas. Co. v. Kacer, 169 Mo. 313; Masonic Assn. v. Bunch, 109 Mo. 580; Hoffman v. Ins. Co., 56 Mo. App. 306; Robinson v. Ins. Co., 168 Mo. App. 259; Clarkston v. Ins. Co., 190 Mo. App. 631; Lewine v. K. of P., 122 Mo. App. 547; Wells v. Ins. Co., 126 Mo. 638; Callies v. Ins. Co., 98 Mo. App. 526; Diehm v. Ins. Co., 129 Mo. App. 256; Eves v. Mod-

McKinney v. Insurance Co.

ern Woodmen, 153 Mo. App. 247; Splawn v. Chew, 60 Tex. 532; Mutual Life Ins. Co. v. Twyman, 122 Ky. 513; Hopkins v. Hopkins, 92 Ky. 324; Crice v. Ins. Co., 122 Ky. 572; Hopkins v. Ins. Co., 99 Fed. 199; Lamb v. Ins. Co., 106 Fed. 637; Ins. Co. v. Swett, 222 Fed. 200; In re Orear, 178 Fed. 632; In re Herr, 182 Fed. 717; In re Bonvillain, 232 Fed. 370; Hicks v. Ins. Co., 147 N. W. (Ia.) 883; Bilbro v. Jones, 102 Ga. 161; Littleton v. Sain, 126 Tenn. 461; Ins. Co. v. Healy, 25 N. Y. App. Div. 53; St. John v. Ins. Co., 13 N. Y. 31; Bacon on Benefit Societies and Life Insurance (3 Ed), sec. 291, (a), (b); Alba v. Ins. Co., 118 La. 1021; Hutson v. Merrifield, 51 Ind. 24, 29; Eagle v. Ins. Co., 48 Ind. 284; Ins. Co. v. McGinnis, 99 N. E. 751; Beggert v. Straub, 193 Mass. 77, 79; In re Estate Heilbron, 14 Wash. 536; Ins. Co. v. Palmer, 42 Conn. 64. (2) Where a policy contains a provision for paid-up insurance upon the non-payment of any premium when due, conditioned upon a demand therefor and a surrender of the policy, and the policy gives the insured the right to change the beneficiary, the right to demand and surrender the policy for paid-up insurance is in the insured alone and he may demand and surrender the policy for paid-up insurance without the consent of the beneficiary. Bilbro v. Jones, 102 Ga. 161; Hopkins v. Ins. Co., 99 Fed. 199; Ins. Co. v. Swett, 222 Fed. 200; Hicks v. Ins. Co., 147 N. W. (Ia.) 883; Crice v. Ins. Co., 122 Ky. 572. (3) Secs. 6946-6949, R. S. 1909, enter into and become a part of the policy or contract of insurance. Under these statutes the insured was the legal holder of the policy in suit, and was authorized to surrender the same either in exchange for paid-up or extended insurance or for any other consideration deemed adequate in his judgment. Head v. Ins. Co., 241 Mo. 413; Cravens v. Ins. Co., 148 Mo. 608; Smith v. Ins. Co., 173 Mo. 352; Horton v. Ins. Co., 151 Mo. 604; Capp. v. Ins. Co., 117 Mo. App. 532, 536; Fahle v. Ins. Co., 155 Mo. App. 15.

BOND, P. J.—I. Action on a policy of life insurance to recover amounts totalling thirty thousand dol-

lars, or the commuted value thereof of \$21,522. The answer was a general denial and the cause was tried without a jury on an agreed statement of facts, resulting in a judgment for plaintiffs for \$2760, less costs. The plaintiffs appealed.

The agreed statement of facts, in substance, is as follows:

That this case shall be submitted to the court upon an agreed statement of facts and such other testimony as either party may deem material, all objections by either party to the sufficiency of the pleadings being hereby waived.

The defendant is a corporation organized under the laws of the State of Pennsylvania and licensed to do the business of life insurance in the State of Missouri; that on the 29th day of December, 1903, defendant issued and delivered to Charles S. McKinney its policy of life insurance, dated December 29, 1903, in the sum of \$30,000, a copy of which is hereto attached, marked "Exhibit A," to this agreed statement; that on December 29, 1903, Charles S. McKinney resided in the city of St. Louis, State of Missouri; that said policy (Exhibit A) remained in the possession of the said Charles S. McKinney until November 25, 1912, when it was surrendered by the said Charles S. McKinney to the defendant as hereinafter stated.

The plaintiffs, beneficiaries named in said policy, had no knowledge of the surrender of the same by said Charles S. McKinney until after his death; that all the premiums provided for in said policy were duly paid by the said Charles S. McKinney to the defendant up to November 1, 1912; that the premium due November 1, 1912, was not paid on that day, or within the thirty-day-grace period provided and allowed for such payment in the clause headed, "General Precedent Conditions," on the second page of Exhibit A; that said policy, on December 1, 1912, had a paid-up value of \$2760, and, if not legally surrendered on or before that date, was entitled to be continued in force for the full amount thereof for a period of three years and one month from that date;

McKinney v. Insurance Co.

that on November 19, 1912, said Charles S. McKinney wrote to the defendant company as follows:

St. Louis, November 19, 1912.

Mr. L. G. Fouse, President

Fidelity Mutual Life Insurance Co.,
Philadelphia, Pa.

My Dear Sir:

I have a policy with your company No. 148,948. I want to take paid-up insurance on this policy.

I inclose you self-addressed envelope so that you may further direct my steps in this direction.

Thanking you in advance,

Yours truly,

C. S. McKINNEY.

That said letter was duly received by said L. G. Fouse on or before November 22, 1912; that on November 22, 1912, the defendant company, through its authorized agent J. B. Franks, assistant actuary, wrote to said Charles S. McKinney the following letter:

Philadelphia, Pa.

November 22, 1912.

IN RE: PAID-UP INSURANCE LOAN.

No. 148,948.

Mr. Charles S. McKinney,
4109 Westminister Pl.,
St. Louis, Mo.

Dear Sir:

We have your favor of November 19. Your policy of the above number can be surrendered at the present time for a paid-up policy of \$2760 payable in one sum at your death, etc.

Yours truly,

J. B. FRANKS,

Assistant Actuary.

That said letter was duly received by said Charles S. McKinney on or before November 25, 1912; that on November 25, 1912, the said Charles S. McKinney wrote to L. G. Fouse, president of the defendant company the following letter:

McKinney v. Insurance Co.

St. Louis, November 25, 1912.

Mr. L. G. Fouse,
Fidelity Mutual Life Insurance Co.,
Philadelphia, Pa.

Dear Sir:

I am enclosing you my policy 148,948. Also I am returning your blank form No. 375, properly filled out, and you may return to me the paid-up value on this policy.

Thanking you in advance,

Yours truly,

CHARLES S. MCKINNEY.

That said letter was duly received by said L. C. Fouse, president, on or before November 28, 1912; that on November 25, 1912, the said Charles S. McKinney, executed and sent to the defendant company with his said letter of that date the following paper, to-wit:

SURRENDER AND CANCELLATION OF POLICY CONTRACT.

I, the insured under policy 148,948, issued on the 29th day of December, 1903, on the life of Charles S. McKinney, of St. Louis, Mo., by the Fidelity Mutual Life Insurance Company, of Philadelphia, Pa., do hereby in consideration of the issuance of a paid-up policy for \$2760, payable in one sum at death, request a cancellation of said policy and do, for myself and my legal representatives, hereby release and forever discharge the said Fidelity Mutual Life Insurance Company from all actions, causes of action, suits, controversies, claims and demands whatsoever, for and by reason of said policy No. 148,948, or of any matter, cause or thing connected therewith.

In Witness Whereof I have hereunto set my hand the 25th day of November, A. D. 1912.

CHARLES S. MCKINNEY.

Witnesses:

OMAR HILTON.

That said paper was duly received by the defendant on or before November 28, 1912; that pursuant to the request contained in the letter of Charles S. McKinney, of November 25, 1912, and in the paper designated "Surrender and Cancellation of Policy Contract," hereinabove set out, the defendant prepared and executed its policy of paid-up insurance dated November 25, 1912, in the sum of \$2760, a copy of which policy is hereto attached, marked "Exhibit B," and on December 3, 1912, wrote to the said Charles S. McKinney the letter of that date, a copy of which is as follows:

McKinney v. Insurance Co.

Philadelphia, Pa., December 3, 1912.

IN RE: POLICY NO. 148,948, ENCLOSED.

Mr. Charles S. McKinney,
4109 Westminster Place,
St. Louis, Mo.

Dear Sir:

We enclose herewith participating paid-up policy of above number for \$2760 issued per instruction of our actuarial department, and your letter of the 25th enclosing policy and form No. 375.

Yours very truly,

R. L. TULL,
Secretary Policy Dept.

That said letter dated December 3, 1912, and said policy (Exhibit B) were sent to the said Charles S. McKinney through the medium of the United States mail, postage prepaid, on December 3, 1912, and were delivered at his residence, 4109 Westminster Place, St. Louis, Missouri, on December 5, 1912; but it is further stipulated and agreed that the letter of December 3, 1912, and said policy (Exhibit B) were not delivered at the residence of Charles S. McKinney until after the death of said Charles S. McKinney, on December 5, 1912, as hereinafter set forth, and said policy was not seen by Charles S. McKinney prior to his death on said December 5, 1912.

Plaintiffs, beneficiaries named in said original policy, returned said second policy to the company and refused to accept same; that said policy was afterwards returned to the attorney for plaintiffs by the company, and it is agreed that plaintiffs shall deposit said policy with the clerk of the circuit court of the city of St. Louis, upon the filing of this agreed statement of facts, to be retained by said clerk until the determination of this suit, when it shall be delivered to defendant; that the rights of the plaintiffs shall not be prejudiced by anything done by them in regard to said policy; that said Charles S. McKinney died on December 5, 1912, about one p. m., in the city of St. Louis and at the Mercantile Club in said city; that his death was sudden; that the cause thereof was heart disease; that due proofs of

death and demand for the payment of the sum of \$30,000 were made by plaintiffs, and that the payment of said sum was refused.

That the defendant admitted its liability for the sum of \$2760, the sum insured by Exhibit B; that it tendered payment of said sum to the plaintiffs; that acceptance of said sum was refused; that the defendant has at all times maintained its tender and upon the filing of this agreed statement has deposited in court the sum of \$2760, which it still admits is due to the plaintiffs; that said original policy referred to in paragraph two of the agreed statement of facts has a commuted value payable in lieu of the installments payable under said policy and under the conditions specified therein of \$21,522; that should the finding and judgment of the court be that the defendant is liable to plaintiffs on said policy mentioned in paragraph 2 of this agreed statement of facts, being the original policy issued to Charles S. McKinney, then judgment may be rendered in favor of plaintiffs for the commuted value of the installments payable under said policy and the amount deposited in court shall be applied as part payment thereof, and the court costs shall be taxed against defendant; but, if, on the other hand, the court shall find and adjudge that the defendant is liable for only the amount of \$2760, then the court costs shall be taxed against the plaintiffs and be deducted from the said deposit; that from and after the issuance of the original policy and until it was surrendered by the insured, said policy remained in the sole possession of the insured and was never in the possession of the plaintiffs, but plaintiffs had knowledge of the existence of said policy and that they were designated as beneficiaries therein; that the insured paid all the premiums that were paid on said policy and that said policy was never assigned or pledged by the insured or by the beneficiaries thereunder; that said original policy was at all times free from debt within the meaning of that term as used in said policy.

II. The question presented by this appeal is whether the insured had the power to surrender his original policy for a paid-up policy payable at his death to the same beneficiaries, without their consent. The policy belonged to a class of insurance contracts wherein the rights of the beneficiaries were vested (*U. S. Casualty Co. v. Kacer*, 169 Mo. 313; *Blum v. N. Y. Life Ins. Co.*, 197 Mo. 513) and could not be divested prior to the innovation of inserting in such policy a contract provision which entitled the insured to change the beneficiary. This latter provision is as broad as its terms and no broader, and hence it must be construed according to the terms and stipulations expressing it in a given case. [*Grigsby v. Russell*, 222 U. S. 149.] The right to change the beneficiary, whether as an incident to fraternal-beneficial insurance, or as one resting in contract expressed in an ordinary policy, is equally efficacious, and the power to exercise it is measured by the language on which it is founded. Whether it arises by convention or from the nature of the insurance, the beneficiary to be affected by its exercise has a conditional interest only in the policy proceeds, while the power to change such beneficiary continues to exist. [*Rosman v. Travelers Ins. Co.*, 96 Atl. (Md.) 875; *Diehm v. Ins. Co.*, 129 Mo. App. 256; *Lewine v. Sup. Lodge K. P.*, 122 Mo. App. 1. c. 554; *Mut. Ben. Life Ins. Co. v. Swett*, 222 Fed. 200; *Bacon, Benefit Societies*, sec. 291a.] There is some contrariety of view in the rulings in other states (cited in the briefs of counsel) respecting the interest remaining in the insured after he had procured a policy in accordance with the ordinary-life plan to be made payable to another, coupled with a reserved power to change the beneficiary. The conclusion we have reached from the agreed facts renders it unnecessary to review or attempt to reconcile the conflicting views expressed by the courts of sister states.

III. The legal questions presented on this appeal are readily resolvable under the statutes and decisions of this State.

Before calling specific attention to these, it is well to note that we are not called upon to deal with any change made by the insured of the beneficiaries designated when he obtained the policy; for the paid-up policy received by him was payable to the same beneficiaries as the original policy, which was surrendered by him. Not having exercised any power vested in him under that provision of the policy, its terms need not be considered further than as affording an incidental support (in connection with any other provision incorporated in the policy by law or the agreement of parties) for what was actually done by the insured culminating in the delivery to him of the paid-up policy. If there was warrant for this action on his part, either in the terms put into the original policy by the parties or written into the policy by force of the statutes of this State, then the judgment of the court below must be affirmed.

Sections 6946, 6947, 6948 and 6949, Revised Statutes 1909, govern the conduct of the business of foreign insurance companies in this State and are as much a part of an ordinary-life policy written by a foreign company licensed to do business in this State as if the language of the statutes had been inserted in the policy as a part of the agreement of the parties to that contract. [Head v. Ins. Co., 241 Mo. l. c. 413, and cases cited.] Those statutes need not be copied into this opinion. In general their effect is that policies upon which three annual premiums have been paid shall be non-forfeitable; shall carry extended insurance according to a statutory plan; that the "legal holder" of such a policy (Sec. 6947) may demand a paid-up policy for an amount computed by a statutory plan; that the "legal holder" of the policy (Sec. 6949) may himself surrender the policy and thus avoid the self-enforcing provisions of the statute. With the powers expressed by the terms of these statutes embodied in the original policy, it is difficult to see what

impediment could exist in the way of the transaction which was had between the insured and the defendant company. They were the parties to the convention and possessed an absolute right and power to frame their contract as they saw proper, provided its terms and stipulations were not contrary to any rule of law or public policy of this State. The insured was *ex necessitate* the "legal holder" of the policy issued to him, although payable to his wife and child, by virtue of the provisions contained in the policy and the rights secured to him by its terms. Foremost among these was the absolute power to substitute for the original beneficiaries, any other person including himself, at his own will and pleasure. Of coordinate importance to that right is the statutory alternative given to the insured after the payment of three premiums on the policy. As the result of the agreement when the policy was obtained, it was delivered to the insured. Under the terms of that instrument, inserted both by the act of the parties and by the law, certain rights were guaranteed to him which could only be enforceable upon the assumption that he was legally, as well as actually, the holder of the policy; for under the terms of that instrument he could not, without the production of the policy, either alter the beneficiary or surrender it and obtain in lieu a paid-up policy. As to this the language of the policy is significant and conclusive, to-wit: "The *insured*, with the approval of the president or vice president, may, upon the *surrender* of this policy, change the beneficiary." This demonstrates that the status of the insured, as the "legal holder" of the policy, inhered in the formation of the contract itself. The policy provided in a similar way for its surrender by the insured and the delivery to him in consideration thereof, of a paid-up policy in the exact sum for which judgment was rendered in the trial court. Our conclusion is that the policy in question was legally surrendered, unless this was prevented by the terms of another statute to which our attention is directed by the learned counsel for appellant.

IV. The statute relied upon is section 6944, Revised Statutes 1909, and in substance and as far as material provides that a policy made payable to the wife of the insured "shall inure to her separate benefit, independently of the creditors, executors and administrators of the husband." The design of this statute was to affect the *quality* of the estate given to the wife by virtue of her being a beneficiary in the policy and to make whatever should come to her thereunder, a part of her separate estate and exempt from the claims of the creditors of her deceased husband. It was not the design of the statute to disable the husband in the making of his contract, from entering into an agreement which would render the interest of his wife, as beneficiary, wholly contingent upon the non-exercise of such powers as were reserved to the insured under the conventional and statutory terms of the present policy. The statute did not intend nor provide, nor could it be rationally construed, that the husband should not have full liberty to contract with reference to the interest which he might desire to give to his wife as beneficiary in a policy upon his life. It only provides that whatever contract he does make—whether giving her an absolute or a conditional interest—shall result in making that interest, if it ever accrues to the wife, a part of her separate estate. [Clarkston v. Ins. Co., 190 Mo. App. l. c. 631, and cases cited; Hilliard v. Life Ins. Co., 117 N. W. 999; Hopkins v. Hopkins, 17 S. W. 865.]

Our conclusion is that the judgment in this case under the conceded facts is correct. It is, therefore, affirmed. All concur.

**J. J. LINK, Appellant, v. MONTRAVILLE HAMLIN,
and MONTRAVILLE HAMLIN Doing Business as
the AMERICAN MEDICAL JOURNAL.**

Division One, March 12, 1917.

1. **LIBEL: Statute: Applicable to Civil Cases.** The statute defining libel (Sec. 4818, R. S. 1909) is applicable in civil as well as in criminal cases.
2. **———: Pleading: Cause of Action.** An article published in a medical journal charging that the virtue of a medical college "was sullied when an Allopath was placed on the faculty and permitted to purchase a block of its stock, and its final prostitution completed when that same Allopath secured by purchase a controlling interest;" that "this individual professed great love for Eclectic principles, was accepted into our Eclectic societies, and in every way inveigled himself into the good graces of Eclectics, with, we believe, the direct aim of destroying" the college "as an Eclectic institution;" that "this simply goes to show that you cannot change a wolf into a sheep, even if you do clothe him in a coat of wool;" and that "hence the inevitable has happened: the flock of sheep feels the fangs of the animal which could not be hidden for long," charged and was intended to charge that said "Allopath," by fraud, deceit and trickery, got possession of the college and by false representations and actions won the confidence of Eclectics, for the purpose of destroying said college as an Eclectic school; and a petition which sets forth such article, and then by apt allegations avers that it was written and published by defendant and that the charges were intended to charge plaintiff with those things and were false and maliciously made, states a cause of action.
3. **———: Demurrer to Evidence.** In passing upon a demurrer to the evidence it is the duty of the court to draw every reasonable inference from the facts proven that a jury might draw, were the case submitted to them. And where the petition states a cause of action for libel, the publication contains libelous charges and is shown to have been made by defendant, and its charges shown to be false, no demurrer to the evidence should be sustained.
4. **———: Privilege: Malice: Proof.** An assumption as true in editorial comment on a publication known to be false, shows malice. Where there is substantial testimony tending to show that the publication was libelous, that it was untrue and known to be false when published, and that after it was published or along with its publication editorials relating to the same subject and assuming it to be true were also published, the communication is not privileged, but sufficient malice is shown to carry the case to the jury.

Link v. Hamlin.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow*, Judge.

REVERSED (*with directions*).

Frank A. Habig for appellant.

(1) It was conceded by the trial court that the article published of and concerning plaintiff by the defendant was a libel *per se*. Sec. 4818, R. S. 1909; *Kenworthy v. Journal Co.*, 117 Mo. App. 335. Words which on the face of them, when falsely published of a party, in connection with his trade or profession, which must necessarily injure him in respect thereto or which directly tend to the prejudice of such person in his trade or profession, are actionable in themselves without proof of damages. *St James v. Gaiser*, 125 Mo. 527; *McGinnis v. Knapp & Co.*, 109 Mo. 143; *Ukman v. Daily Record Co.*, 189 Mo. 392; *Price v. Whitley*, 50 Mo. 439; *State v. Powell*, 66 Mo. App. 613; *Finley v. Steele*, 159 Mo. 304; *Farley v. Pub. Co.*, 113 Mo. App. 224; *Sullivan v. Commission Co.*, 152 Mo. 268; *Cook v. Globe*, 227 Mo. 534; *Cook v. Pub. Co.*, 241 Mo. 362; *Minter v. Bradstreet Co.*, 174 Mo. 486. (2) The trial court required of plaintiff that he prove not only that the article was false, but that he also prove express malice. It was held in *Cook v. Globe Ptg. Co.*, 227 Mo. 531, that "the falsity of all defamatory words is presumed in plaintiff's favor, and he need give no evidence to show them false." See also *Nelson v. Wallace*, 48 Mo. App. 198; *Minter v. Bradstreet Co.*, 174 Mo. 486. The case of *Cook v. Pub. Co.*, 241 Mo. 362, holds that "proof of the falsity of the facts alone is all that a plaintiff is required to prove and that it is not necessary in addition that the plaintiff should also prove that the publication was inspired by actual malice." See, also *Cornelius v. Cornelius*, 233 Mo. 35. (3) Upon proof of the falsity of the words published, malice is presumed. *Academy v. Gaiser*, 125 Mo. 527; *Mitchell v. Bradstreet Co.*, 116 Mo. 226.

Roy Hamlin and Hamlin, Collins & Hamlin for respondents.

(1) The article was a qualified privileged communication, and being so, the court did right in directing a verdict for the defendants and in support of both propositions we submit that the case of *Holmes v. Royal Fraternal Union*, 222 Mo. 556, is ample authority, together with the cases therein cited. See also *Finley v. Steele*, 159 Mo. 299. The trial court after having heard the evidence offered by the plaintiff found that plaintiff had failed to prove actual or express malice, and found rightly that the article was published by the defendants, honestly believing that the statements made therein were true, or, that they had reasonable cause to believe they were true, and with no motive of malice. In doing so it followed the rule in such cases in this State. *Cornelius v. Cornelius*, 233 Mo. 1; *Cook v. Pub. Co.*, 241 Mo. 326. In such cases the onus of proving express malice and falsity rests upon the plaintiff. *Cook v. Pub. Co.*, supra. (2) The petition does not state a cause of action. The article published was not libelous *per se*, and the language used in same should not be construed as libelous. The language when considered in its ordinary sense simply says that the owner, by reason of his authority, converted the American Medical College into an Allopathic from an Eclectic School, thereby as considered from an Eclectic standpoint, a step backward or retrograding. *Diener v. Chronicle Pub. Co.*, 230 Mo. 625; *Baldwin v. Walser*, 41 Mo. App. 243; *Spurlock v. Investment Co.*, 59 Mo. App. 225.

RAILEY, C.—On August 20, 1910, plaintiff commenced an action in the St. Louis Circuit Court, against said defendants, to recover damages arising out of the publication of a certain alleged libelous article in the *American Medical Journal*.

The amended petition alleges that defendant Hamlin was publishing the above monthly journal, in St. Louis, Missouri; that it has a large circulation in said city, throughout the State of Missouri, and many other States,
270 Mo.—21

as well as the cities therein; that the July number for 1910 was largely circulated as above stated. He alleges that there was printed and published in the July issue aforesaid, in volume 38, number 7, signed by Stephens, defendant herein, the following defamatory and libelous article, of, and concerning plaintiff, to-wit:

“The Rape of the American Medical College.

“We want to caution all our Eclectic friends, that the American Medical College has been raped; that it has been prostituted to allopathy and therefore is no more an eclectic institution. Early in June of this year it was declared, by its OWNER, a regular college and so published in the daily papers.

“The virtue of the college was sullied nine years ago when an allopath was placed on the faculty and permitted to purchase a block of stock, and its final prostitution completed when that same allopath secured, by purchase, a controlling interest. The act of harlotry was finally accomplished in June, 1910. This individual professed great love for Eclectic Principles; was accepted into our Eclectic Societies and in every way inveigled himself into the good graces of Eclectics with, we believe, the direct aim of destroying the American as an Eclectic institution. This simply goes to show that you cannot change a wolf into a sheep, even if you do clothe him in a coat of wool. Hence the inevitable has happened. The flock of sheep feels the fangs of the animal which could not be hidden for long. So we warn you, our friends, to look to it that no Eclectic student enters the poisoned atmosphere of this institution. The American has no standing, having been condemned by the American Medical Association as incompetent, and it is no longer a member of the Confederation of Eclectic Colleges. Its diplomas were refused recognition by the Illinois board at the close of the last session because of meager equipment. From this it is evident its graduates can have no standing professionally. The institution has no future and its death is only deferred for a very short time. In the very nature of things it must draw its students from the allopathic ranks, and we ask in all seriousness, what fool would jeop-

Link v. Hamlin.

ardize his future professional career by graduating from a one-man allopathic college without a single feature to recommend it? What kind of a young man would he be who would pass the Washington University and the St. Louis University by as allopathic institutions, and attend an insignificant college standing in their shadow and but poorly manned with instructors? God pity the people who employ such a man, a man whose lack of judgment would induce him to take such a course. Decidedly, the place for such a man is in the insane asylum. There is no excuse of a small college at the present time except as an Eclectic or Homeopathic institution.

“We want our readers to know that every Eclectic who held a chair in the faculty of the American while it yet retained a semblance of Eclecticism, quit the institution at once when the rape took place, for none of them was a party to the act of prostitution. These are now banded together and are all working harmoniously to establish a new Eclectic Medical College in St. Louis, ready for instruction in September, where Eclecticism will be taught and where its principles will remain forever supreme. And the first scoundrel who shows his flat head will receive a rap that will deter him from committing an offense such as has been done the American. Professional sneaks will be dealt with according to their deserts henceforth.

“We also want to warn you that a concerted movement is going forward all along the line to destroy us as a school (of which we believe the course of the American Medical College forms a part) and you who think you are loved to death by this tribe of bigoted rascals, know, that they only lick you preparatory to making a meal of you. Be warned in time for the American Medical Association, backed by the moneyed interests of this country are doing all in their power to crush everybody but themselves, as is shown by the many obnoxious bills introduced into Congress the past session. Therefore, look to your own interests and keep clear of all connections with those who would destroy you without compunction,

for 'they come as a thief in the night' to rob you of your inheritance.

"We are fighting the same old fight our fathers fought, and the battle ahead of us is as great as they ever fought because, while they were ever awake to the dangers that lurked on every hand, we have been lured into a dangerous lethargy by blandishments and ostensible good will.

"We would be glad to have a letter, good and strong, from every Eclectic who may read this as a token of alertness and in evidence of good will. Remember we are working for you as for ourselves, and our fight is your fight. Let us then stand shoulder to shoulder against the common enemy; shoulder to shoulder for freedom in medical practice; and if we thus stand together, there is no power on earth, nor in hell where all oppression springs from, that can destroy us. If we do not, the sun of Eclecticism will forever set, and that in this generation.

"Let us work then as brothers in a good cause and give of our time and money when necessary and all will be well.

"STEPHENS."

Plaintiff alleges that he is the "owner and allopath" referred to in said article; that defendants meant and intended to charge therein, and its readers understood he was being charged with having, by fraud, deceit and trickery, gotten possession of said college, and by false and fraudulent representations, statements, and actions won the confidence of defendants and others, and especially stockholders and members of said American Medical College, with the direct aim and for the purpose of getting possession of said college and destroying the same as an eclectic institution; and that plaintiff was a wolf in sheep's clothes, ready to destroy, and a person to be avoided; that he was a "flat headed scoundrel;" that he was a professional sneak;" that he was one of the "tribe of bigoted rascals;" that they "only lick you preparatory to making a meal of you;" meaning and inferring that plaintiff would practice deceit and trickery to gain your confidence,

Link v. Hamlin.

and then destroy a person of their rights; and that he was meant to represent "a thief in the night," to rob and steal from eclectics and others their rights. The petition then denies the truth of said allegations, insinuations and innuendoes. It is averred that said charges were wilfully, wantonly and maliciously made by defendants concerning plaintiff; that they were false and known to be so, when published by defendants; that they were designed to deprive plaintiff of public confidence, and to expose him to public hatred, contempt and ridicule, and to deprive him of the social intercourse of the physicians and medical men, as well as all other persons, where said journal circulated, and thereby injure plaintiff in his business and profession of physician and surgeon, and as president of said American Medical College, president of the American Hospital and president of the Association Hospital, all of the city of St. Louis, Missouri.

Plaintiff sued for \$5000 as actual and \$10,000 as punitive damages.

On February 26, 1913, plaintiff dismissed as to Stephens.

Defendant Hamlin filed an amended answer to the amended petition, and admitted the truth of certain facts as follows: That defendant is the owner of the American Medical Journal, published in St. Louis, the same having a circulation in said city, the State of Missouri, as well as in many other cities and states throughout the United States; that in the July issue of the American Medical Journal there appeared an article signed "Stephens" substantially in manner and form, as set forth in petition. He admits that J. J. Link is the owner and allopath referred to in said article. He denies every other allegation in the petition.

The answer avers that plaintiff, a graduate of the regular school of medicine, on his application, joined several societies of Eclecticism; that he obtained forty-eight shares of stock, out of one thousand, in the American Medical College; that he continued thereafter a member of the faculty of said college, and until 1910, "*continued to teach the principles of Eclectic medicine and*

surgery therein;" that he acquired a majority of the stock of said college, and in June, 1910, had the following resolution passed by the board of directors of said college, to-wit:

"Whereas, sectarianism is not in accord with the spirit of the times, be it resolved that the American Medical College is and shall be a Regular School of Medicine."

There is but little, if any, controversy over the foregoing facts.

The answer further alleges, that the St. Louis Globe-Democrat, on its first page, in large letter-heads, contained the following:

"Eclectic School Shifts. The American Medical College Converted Into an Allopathic Institution." That a picture of Dr. James M. Ball appeared on the same page of said paper, and was referred to as follows:

"Dean of the School that joins Allopathic ranks."

Defendant alleges that soon after said college was organized, he became the dean thereof, and continued for many years to teach therein; that after plaintiff secured control of a majority of the stock of said college and was then able to dictate its policy, he became convinced that "plaintiff was not at heart an Eclectic, and he, therefore, resigned his position as dean of said college."

He alleges, that on account of said change in the college and the publication aforesaid, it would be readily inferred that the change was made because the college board believed they had been in error in teaching the principles of Eclecticism, and that the change was made to correct this error; that, inspired by a desire to publish the truth, on account of the matters aforesaid, he caused the publication of the article set out in the petition, in order to warn the friends of Eclecticism that said change was brought about *solely* on account of plaintiff having acquired a majority of the stock of said college. He denies in the answer, that said article was intended to charge that plaintiff was a "*wolf in sheep's clothing*," or that he was a "*flat headed scoundrel*," or "*professional sneak*," or that he was one of a tribe of "*bigoted rascals*" that lick you only preparatory to making a meal of you, as charged

Link v. Hamlin.

in plaintiff's petition. He alleges that said article did not refer to "plaintiff's professional or social standing," or was so understood by the readers of said article, but that said publication, "in all its intent and innuendo was directed wholly to his acts and conduct in connection with the said American Medical College, and the fact that he had, by professing to be in love with Eclectic principles, by joining the societies of Eclectics, by accepting a position on the faculty of an old and well-known Eclectic College, and teaching said principles of Eclecticism therein, succeeding in inveigling himself into the good graces of Eclectics, whereby he was permitted to purchase stock in said college, and finally to acquire the entire control thereof, and to the fact that after he had acquired the control of said college, he converted it into a regular school, and advertised the same to the world at large in such manner that physicians and surgeons generally were wont to believe that said old and renowned Eclectic college had shifted to Allopathy (i. e., the regular school) because Sectarianism (i. e., Eclecticism) was no longer in accord with the spirit of the times."

The answer further alleges, that defendant was informed by plaintiff's counsel that his client felt that said article reflected on his integrity and character and demanded a retraction; that defendant then published in the August issue of the American Medical Journal, the following:

"Ours is an Eclectic Journal; it fights the battles of Eclecticism, and will continue its course in the future as in the past, as the editor's judgment dictates. . . . We were convinced four years ago what Link's idea was as to the future of the college. In all that we have said, we have scrupulously avoided saying anything derogatory to Dr. Link's personal character, or his professional ability, but we have only referred to his acts as they relate to the American Medical College."

Defendant's answer alleges that in said August issue of the Journal he referred to the article complained of, published in the July issue, and said he did not intend to cast any aspersion on the personal character or profes-

sional ability of any man, but was referring to the change in said college as aforesaid.

The concluding paragraph of said answer alleges that the article complained of, was not published wantonly or from malice toward the plaintiff, but solely in the interest of truth and justice; that the same was a privileged publication in the interests of truth and justice; that "any and all language therein contained, which, by its form, meaning or innuendo, charges that the plaintiff by deceitfully representing that he was an Eclectic inveigled himself into the good graces of Eclectics, and thereby was permitted to acquire stock in said college, if any, is true, and this defendant honestly believed as herein stated that the direct aim of the plaintiff in so doing was to destroy the American Medical College as an Eclectic institution, and that the plaintiff is not entitled to the relief prayed for in his petition," etc.

The reply *admits* the publication of the libelous article complained of; that plaintiff, J. J. Link, is the person referred to in said publication; that the American Medical College, is a corporation, duly organized under the laws of Missouri; that at one time said college taught the Eclectic system of medicine; admits that the system of teaching was changed in June, 1910; that he was a graduate of the regular school of medicine; that he was requested by the propr officers of said college to act, and was appointed to lecture on operative surgery in said college; that he subsequently joined the various Eclectic medical societies; *admits that he believed in certain principles of the so-called Eclecticism*; that he purchased capital stock of said college, and finally did acquire a majority of said stock, but denies that by any false representation, or by any form of trickery or deceit, or otherwise, than by fair and honest bargain, he obtained said stock of said college; and further admits that proper notice was given to the public through the press and otherwise, of the change of the policy of the said school in its teaching. After setting out certain correspondence and publications referred to, the reply denied all the other allegations of said answer. It set out fully the facts which made it

Link v. Hamlin.

necessary to change said college from an Eclectic to the regular school, and as tending to show that defendant's allegations in respect to said matter were untrue.

On February 28, 1913, a jury returned a verdict in favor of plaintiff for \$1,500 actual and \$880 punitive damages. Defendant's motion for a new trial was sustained, and the cause tried anew on January 7, 1914.

Defendant's counsel objected to the introduction of any evidence at the trial of this case, because the petition did not state a cause of action, and said:

"There is but one substantial statement of fact made in the article, viz: 'This individual' (referring to the plaintiff) 'professed great love for Eclectic principles; was accepted into our Eclectic societies and in every way inveigled himself into the good graces of Eclectics with, we believe, the direct aim of destroying the American as an Eclectic institution,' . . . and the only thing charged against the plaintiff is *that he fooled them into thinking he was an Eclectic when he was an Allopath that got into their society and stole their college.*"

It was conceded by defendant, that plaintiff, J. J. Link, was employed regularly to lecture at said college; that the latter was incorporated under the laws of Missouri, with a capital stock of \$10,000, divided into a thousand shares at ten dollars each; that plaintiff was connected with the college in June, 1910, as professor of clinical surgery, and that he was also treasurer of said college; that at a meeting of the stockholders on June 6, 1910, the course of teaching in said college was changed from the Eclectic to the regular or Allopathic school.

Plaintiff was sworn as a witness, and testified that he resided in St. Louis, Missouri; that he was a surgeon and graduate of Northwestern University Medical School, which teaches the regular or Allopathic school of medicine; that he was an Allopath and graduated in 1890; that he had been connected with the American Medical College since 1902; that it was known as an Eclectic school; that he became connected with it at the suggestion of Dr. C. P. Clayburg, who became dean of the school after that. Plaintiff identified and read in evidence, the

article complained of, entitled, "The Rape of the American Medical College." He read in evidence an article published in the same edition of defendant's Medical Journal, which sets out the heading under which the college was advertised after the above change. Among other things, it contains the following:

"More than four years ago a certain allopath, named J. J. Link, conceived the idea of wresting the control of the college from our hands, and through the connivance of certain traitors to our cause, he succeeded."

He read in evidence an article published in defendant's journal, of date June 10, 1910, headed, "Link had a Meeting," in which the meeting changing the teaching of the college was criticised and the appellant subjected to public ridicule. He also read in evidence another article published in defendant's Journal, of the same issue as the above, which reads as follows:

"Will the graduates of the Old American Medical College be satisfied to let their Alma Mater die? *or, what is worse than death, pass into the hands of this Allopath, who practiced every known deception to accomplish his design—even to joining all our societies and declaring himself as good an Eclectic as the editor of this Journal?*

. . . Four years ago this month we sounded the alarm. When J. J. Link managed to get control of a majority of the stock of the American Medical College we promptly resigned both the deanship and our chair in the college, stating that we could not, nor would not submit to the dictation of an Allopath. . . .

"We are not a prophet, nor the son of a prophet, but after an *intimate* association with this man Link for four years we were in a position to know our man; and it now developes that we *did know him.*" (Italics are ours).

Thereupon, the court ruled that plaintiff would be required, by his first witness, to prove not only the falsity of the article complained of, but also that it was *inspired by express malice.*

Plaintiff testified that he bought the stock of said college from other members of the faculty; *that he used no deception of any kind in acquiring same; that he did*

not, with any false design, attempt in any way to destroy said college as an Eclectic school; that he did not state to any member of the college that he was an Eclectic; that he never, at any time, stated to any of them that he was not a member of the regular school; that he never, at any time, stated to anybody that he, at any time, changed his system of thought. Plaintiff further testified that, at date of trial, he was professor of surgery and head of the department of the National University, which was then the American Medical College; that he was also on the board of the University.

Upon cross-examination, plaintiff testified that he was a graduate of the Northwestern Medical School, which is known as a regular or Allopathic school; that he had always practiced medicine as such; that prior to his connection with the American Medical College he was professor of physiology, chemistry and hygiene in the regular school of physicians and surgeons. He testified, that "Eclecticism" means, "*Choose that which is the best;*" that the regulars always practiced it; that he had always practiced it and meant to practice it; that the American was known as an Eclectic school; *that he had always approved of Eclecticism in its full sense; that it was all right and that they had always practiced Eclecticism when they chose it, being the best for the patient. He testified that Doctor Hamlin asked him to buy the stock; that there was no difference between the schools in the teaching of surgery; that he talked with defendant before coming into the college, but did not mention his ideas as to Eclecticism; that he did not speak of Eclecticism to any one; that Dr. Younkin asked him to come in and take his chair in surgery and that Dr. Hamlin asked him to come in as teacher of anatomy; that these doctors were members of the faculty and on the board of trustees; that he purchased some stock in 1903, and that when he came to the college, the members of the faculty knew he had graduated and that his name had been in the directory as a regular practitioner; that he had joined the Eclectic society about six months or a*

year after he became connected with the college; that while connected with the college he wrote papers on surgery before Eclectic societies; that he belonged to the St. Louis Medical Association, which was the regular school; that he did not retire from said association when he joined the Eclectics; that he belonged to both societies at the same time, and that a good many other doctors do the same; that a good many doctors of the Eclectic society had asked him if he belonged to the regular or Allopathic society, at the time he joined the American College, and he told them he did; *that Dr. Clayburg and Dr. Hamlin had also asked him; that there was no secret about it;* that Dr. Hamlin had a directory in the library which stated that plaintiff belonged to both societies; that at the time he joined the societies, it was not contrary to the ethics of the Eclectic society to belong to both; but it is now contrary to the ethics of the Allopathic society to join both. He testified that Dr. Hamlin owned 380 shares of stock; *that the only purpose he (plaintiff) had in buying the stock was because Doctors Clayburg, Helbing and Hamlin urged him to buy it; that he was heartily in sympathy with Eclectic principles and that he never discussed the question of his loyalty to Eclectic principles with anybody.* Plaintiff testified *that he offered to sell his stock to members of the Eclectic societies and college, at what it cost him and without interest; that he offered to sell on time and could find no purchasers;* that he offered to sell his stock to Eclectics at par, which was less than it cost him.

Plaintiff was cross-examined as to an editorial in the "Medical Harbinger" written by Dr. Tucker, in which it was recited that Doctors Hamlin and March, editors of the American Medical Journal and Medical Arena, put forth an effort at Kansas City to combine said journals and make it the organ of Eclecticism, and that their proposition was voted down. Plaintiff further testified that some of the Eclectics were not agreeable; that there was factional trouble among them; that he tried to bring them together; that the Eclectics did not

support Dr. Younkin in the matter; that he also learned there was a movement on foot to establish a new Eclectic college in St. Louis; that he knew if one could not pay, two could not; that he called the representative Eclectics together at a meeting and offered them the whole college at their own terms; that they refused said offer and gave no reason therefor.

Dr. Snow corroborated plaintiff in respect to offering his stock at par and giving the purchasers their own terms. This was in May, 1910, before the change in June of same year.

Plaintiff testified as to the worry and depression said articles caused him, and likewise testified as to his loss of business, etc.

At the conclusion of the above testimony, the court, during the argument on a demurrer to the evidence, stated that in his opinion no *malice* was shown and thereupon gave a peremptory instruction to the jury to return a verdict in favor of defendant. The plaintiff took an involuntary nonsuit, with leave, etc. Appellant in due time filed his motion to set aside said nonsuit and for a new trial, which was overruled, and the cause was duly appealed by him to this court.

It is insisted by respondent that plaintiff's petition fails to state facts sufficient to constitute a cause of action. He likewise contends that plaintiff's evidence was insufficient to warrant the trial court in submitting the case to the jury. The lower court overruled the first contention, but at the conclusion of plaintiff's case directed a verdict in behalf of defendant.

In order to pass upon both questions intelligently, we have substantially set out the pleadings; the article complained of in petition, and the evidence introduced in behalf of plaintiff.

I. Does the amended petition state a good cause of action against defendant? Section 4818, Revised Statutes 1909, defining libel, reads as follows:

“A libel is the malicious defamation of a person made public by any printing, writing, sign, picture, representation or effigy tending to provoke him to wrath or expose him to public hatred, contempt or ridicule, or to deprive him of the benefits of public confidence and social intercourse.”

Cause of
Action.

In passing upon the sufficiency of the petition it becomes our duty to consider the same on the theory that all the facts well pleaded therein, are to be taken as true. Among other things the article complained of states that:

“The virtue of the college was sullied nine years ago when an allopath was placed on the faculty and permitted to purchase a block of stock, and its final prostitution completed when that same allopath secured by purchase a controlling interest. The act of harlotry was finally accomplished in June, 1910. *This individual professed great love for Eclectic Principles; was accepted into our Eclectic Societies and in every way inveigled himself into the good graces of Eclectics with, we believe, the direct aim of destroying the American as an Eclectic institution.* This simply goes to show that you cannot change a wolf into a sheep, even if you do clothe him in a coat of wool. Hence the inevitable has happened. The flock of sheep feels the fangs of the *animal* which could not be hidden for long.” (Italics are ours).

The plain import of the above language was to charge—and intended by defendant to charge—that plaintiff, by fraud, deceit and trickery, got possession of the American Medical College and by false and fraudulent representations, statements and actions, won the confidence of defendant and others, and especially with the direct aim, and for the purpose of obtaining possession of said American Medical College, and destroying the same as an Eclectic institution. It is further charged by innuendo, that plaintiff, in accomplishing said alleged purpose, was a *wolf* and *animal*. It is averred in the petition that the readers of said Journal construed said language as above indicated; that the statements afore-

Link v. Hamlin.

said were false, and known by defendant to be false when made; that they were wantonly, wilfully and maliciously made to injure plaintiff, etc.

We are of the opinion that a cause of action is stated; that the allegations of the petition bring the case within the purview of section 4818, Revised Statutes 1909, *supra*, and that said section is applicable in civil as well as criminal cases. [*Sotham v. Telegram Co.*, 239 Mo. l. c. 619; *Wright v. Great Northern Ry. Co.*, 186 S. W. l. c. (Mo. App.) 1088.]

II. Was the trial court justified in directing a verdict for defendant? In passing upon the demurrer to the evidence, it devolves upon us to draw every reasonable inference from the facts proven, which a jury might have

Demurrer to Evidence. drawn, had the case been submitted for their consideration. The testimony shows that the charges made in the publication under consideration, in so far as they relate to any alleged improper conduct upon the part of plaintiff, are shown to be false. The jury would have been justified under the evidence, in finding that plaintiff had been guilty of no impropriety in respect to all of his dealings relating to the American Medical Society. We rule that the evidence was sufficient to warrant the jury in finding that the matters contained in said publication constituted a *libel* against appellant. The evidence heretofore set out, as well as other testimony not mentioned, was clearly sufficient, in our opinion, to warrant the jury in finding, not only that defendant had libeled plaintiff in the publication of said article, but that the same, in connection with the subsequent utterances of defendant, indicated *malice* upon his part against the plaintiff in the publication of said article.

The court below, therefore, committed reversible error in directing a verdict in behalf of defendant.

III. Counsel for respondent contend that the article complained of was a privileged publication; and that plaintiff's case should fail, because he failed to prove

malice. Cornelius v. Cornelius, 233 Mo. 1, and Cook v. Publishing Co., 241 Mo. 326, l. c. 359, are cited *Privilege.* in support of above contention. While defendant claims in his *answer* that he represented Eclectics in the publication of said article, and that by reason thereof it was privileged, yet no proof was offered in support of this contention. On the contrary, the only testimony in the case relating to this subject, is found in the letter of Dr. C. A. Tucker to the editor of the Medical Harbinger, read in evidence by defendant, and in which he says:

“Do you remember anything about an effort put forth at our state meeting in Kansas City last June by Drs. Hamlin and March, editors of the American Medical Journal and Medical Arena, to combine the Eclectic Journals of our State and make it the organ of Eclecticism of our state society? Do you, who were there, remember how we voted that proposition down?”

In the very able and carefully considered opinion of Judge KENNISH, in Cook v. Publishing Co., 241 Mo. l. c. 362-3, relied on by respondent, a marked distinction was drawn between *privileged communications* and *privileged comment*, as follows:

“It will be noted that under the rule of the authorities last cited the defense of privileged comment fails upon proof of the falsity of the facts alone, and it is not necessary that the plaintiff should prove in addition thereto that the publication was inspired by actual malice, as in the case of a defense of privileged communication. It should be observed further that under all the rules stated, proof of the falsity of the facts and knowledge of such falsity is proof of actual malice.

“We think there is good reason for recognizing the distinction thus made between the law applicable to the defense of privileged communications and that of privileged comment, making the privilege broader in the former than in the latter. In the former the communication is usually made under a sense of duty and to one person or a limited number of persons. The privilege of comment, on the other hand, while of the highest importance

to the public welfare, is not made under a sense of duty, but is purely voluntary, and when the unlimited extent of the publication and the consequent injury to the complainant is considered, it would, in our opinion, be a most dangerous doctrine to require the plaintiff, in order to make a prima-facie case, to prove not only that the facts were false, but also that the defendant was actuated by express malice.

"We think the rule to be deduced from the authorities and in accord with the better reason, is that when a defense of privileged comment on a matter of public interest is presented by the issues, the plaintiff may overcome the privilege pleaded either by proof that the publication was inspired by actual malice, or that the facts published and commented upon were false."

Plaintiff's testimony is uncontradicted and in clear language refutes the truth of the libelous matter complained of in said publication. In *Cornelius v. Cornelius*, 233 Mo. l. c. 31, Judge LAMM, quotes with approval from the opinion of Judge PAXSON, in *Briggs v. Garrett*, 111 Pa. St. l. c. 414, as follows:

"A lie is never privileged. It always has malice coiled up within it. When a man coins and utters a lie, or when he repeats it knowing it to be false, the law implies malice, and he cannot shelter himself behind the doctrine of privileged communications."

There is no testimony in the record which warranted the court in disposing of plaintiff's case as a matter of law. The jury had before them substantial evidence tending to show that said article was libelous; that it was untrue and known to be so when published; and that the publication of the same with the supplemental and repeated comments of defendant relating to the same subject, were inspired by malice.

IV. The question as to what elements of damage may be considered, if plaintiff is entitled to recover under the pleadings, need not be considered **Damages.** now, as the case will have to be re-tried, and this question may not arise again.

Turpin v. Powers.

We accordingly reverse the case, with directions to the trial court to set aside its judgment herein and to proceed with the trial of the case in conformity to the views here expressed.

Brown, C., concurs.

PER CURIAM:—The foregoing opinion of BAILEY, C., is hereby adopted as the opinion of the court. All the judge concurs.

CHARLES H. TURPIN v. ANTHONY W. POWERS,
Appellant.

In Banc, March 13, 1917.

1. **ELECTIONS: Voting: Two Names for Same Office.** The statute (Sec. 5909, R. S. 1909) specifically provides that if a ballot contains a greater number of names for any office than the number of persons required to fill such office, it shall be considered as fraudulent as to the whole number of names designated to fill such office. And where two constables for the same district were to be elected, the writing by 38 voters of their own names on or just under the dotted line below the printed names of the two nominated candidates for that office, made those ballots void for all three.
2. ———: ———: ———: **Writing Voter's Own Name on Ballot.** A voter has a right to vote for himself, and if he writes his name under the caption for an office, and thereby more unscratched names remain on the ballot than there are persons to be elected to that office, that ballot cannot be counted for himself or any candidate for that office.
3. ———: ———: **Counting Void Ballots.** If contestant can be given the office only by counting illegal ballots for him, contestee should be awarded the office.

Appeal from St. Louis City Circuit Court.—*Hon. Leo. S. Rassieur, Judge.*

REVERSED.

Holland, Rutledge & Lashly, Ernest A. Green and Thomas A. Dwyer for appellant.

(1) The circuit court of the city of St. Louis has no jurisdiction to try a contest involving the office of constable in said city. (a) Contestant undertook to prosecute his election contest under authority of Sec. 5924, R. S. 1909, but that section enumerates and specifies *eo nomine* the offices it was intended to cover, and the office of constable is excluded. *Taffe v. Ryan*, 25 Mo. App. 563. (b) Contestant then urged that Sec. 7633, R. S. 1909, conferred power and jurisdiction upon the circuit court to try this class of cases. But this section is void. It is in violation of section 53 of article 4 of the Constitution, and particularly sub-sections 2, 15, 17 and 32 thereof. It is a special and local law applicable in terms to the city of St. Louis alone. (c) Section 7633 is not responsive to the title of the article in which it appears. Art. 4, sec. 28, Constitution; *Williams v. Railroad*, 233 Mo. 666; *State v. Coffee Co.*, 171 Mo. 635; *State ex rel. v. Jackson County*, 102 Mo. 537; *Kansas City v. Payne*, 71 Mo. 162; *State v. Distilling Co.*, 237 Mo. 106; *Laws 1879*, p. 41. (d) A special or local law is defined to be a law which in terms is applicable to a particular political subdivision, and the term has especial application where the same subject-matter could be covered by legislation of general scope. *Dunne v. Railroad*, 131 Mo. 1; *Henderson v. Koenig*, 168 Mo. 374; *State ex rel. v. Messerly*, 198 Mo. 351; *State ex rel. v. Williams*, 232 Mo. 56. (2) An election contest as well as every step in the procedure thereof, is purely statutory, and no power inheres in any court in this State to proceed with such an action; nor can any court derive general jurisdiction or power to take the necessary steps or procedure in such an action, excepting it be by and through express authority of a statute. *State ex rel. v. Spencer*, 166 Mo. 285; *State ex rel. v. Hough*, 193 Mo. 615; *Ewing v. Francis*, 87 Mo. 487; *Kehr v. Columbia*, 136 Mo. App. 322; Art. 8, sec. 9, Constitution. (3) The record shows that the court counted for contestant thirty-eight ballots which con-

tained a greater number of names beneath the caption "For Constable" than the number of persons required to fill that office. This was error, and those ballots should be disallowed respondent. Sec. 5909, R. S. 1909; Clark v. Robinson, 88 Ill. 500; Blankenship v. Israel, 132 Ill. 514; People v. Loomis, 8 Wend. 396; State v. Griffey, 5 Neb. 161; McCrary on Elections, sec. 533. (a) This is true whether such name appear on the poll book as the name of the voter who cast the ballot or not. 15 Cyc. 358. (b) Under the law and the order of recount in this case, the Board of Election Commissioners had no power or authority to ascertain whether the names so written upon the face of the ballots and under the caption "Constable" were the names of the voters. The power to compare ballots and poll books in such manner as to destroy the secrecy thereof is limited and restricted to instances of specific allegations of fraud. Gass v. Evans, 244 Mo. 338. There is no allegation of fraud with respect to voters' names on ballots in this case. (c) It is immaterial whether these names written upon the face of the ballots under the caption "Constable" are the names of the voters or not; a man has power to vote for himself. Bowers v. Smith, 111 Mo. 45. (d) Nor should the testimony of such alleged voter be received at the trial with respect to any mental reservation or secret intention which he entertained at the time he wrote his name under the caption "Constable." The ballot speaks for itself, and shows upon its face that the voter wrote in a name under the caption of the office in contest, and this act constitutes a vote for that office. Pennington v. Hare, 60 Minn. 146.

George B. Webster for respondent.

(1) The circuit court has jurisdiction of a contest for the office of constable in the city of St. Louis. R. S. 1909, sec. 7633; R. S. 1909, sec. 2757; Hehl v. Guion, 155 Mo. 76. Section 7633 is not unconstitutional as being a local or special law where a general law could be made applicable. Laws 1879, p. 41; Constitution, art. 9, secs. 23, 24, and art. 6, sec. 27; State ex rel. v. Field, 119 Mo.

Turpin v. Powers.

611; State ex rel. v. Yancy, 123 Mo. 391; State ex rel. v. Speed, 183 Mo. 186; State ex rel. v. Etchman, 189 Mo. 648; State ex rel. v. Fort, 210 Mo. 532. (2) The ballots cast for the respondent, on which the electors casting them had written their names, were properly counted for him. Where the name written on the ballot is that of the voter, it should be counted. Lankford v. Gebhart, 130 Mo. 621; Hanscom v. State, 10 Tex. Civ. App. 638. The Board of Election Commissioners had the right to discover whether or not the names written on these thirty-seven ballots were the names of the persons who cast them and to certify the fact to the circuit court. Constitution, art. 8, sec. 3; R. S. 1909, sec. 5939; Gantt v. Brown, 238 Mo. 575. The Spencer case, 164 Mo. 23, and the Montgomery case, 181 Mo. 5, are overruled. Gantt v. Brown, 238 Mo. 571. The testimony of witnesses that they cast these ballots and wrote their names on them was properly received. A voter may waive his privilege and testify how he voted or marked his ballot. McCrary, Elections, sec. 492; Lankford v. Gebhart, 130 Mo. 621.

WOODSON, J.—This suit was begun in the circuit court of the city of St. Louis by the plaintiff against the defendant to contest the election of the latter to the office of constable in the Fourth District of said city. The judgment below was for the plaintiff and the defendant appealed to this court.

At the November election in 1914, Charles H. Turpin, the plaintiff, and Floyd E. Bush were the Republican candidates and A. W. Powers and Lawrence Daly were the Democratic candidates for that office, this being one of the districts in which there are two justices and two constables to be elected. Upon the face of the returns Bush and Powers were elected. In due time Turpin brought his contest against Powers. On the contestant's motion an order was made by the court on the Board of Election Commissioners of the city of St. Louis to open the ballot boxes and recount the ballots. In pursuance of the order of recount, the board prepared and

filed in the circuit court a list of the votes, with the numbers thereon, in each precinct in the district, showing for whom such votes were cast, as well as a tabulated statement of the result. This also showed the plaintiff was duly elected to the office mentioned. When the case came on to be heard in the circuit court each ballot claimed by either party was taken up and considered, the court heard such testimony as was offered, and finally rendered a judgment holding the plaintiff had received the majority of lawful ballots cast in the district and that he was lawfully elected to the office. The judgment followed the usual form and required the contestee to surrender the office, together with the records thereof.

I. Counsel for plaintiff insists that the judgment of the circuit court should be affirmed because the abstract of the record does not conform to the rules of this court. After a careful examination of the abstract, in connection with the stipulations made between counsel and the documents filed in pursuance thereof, we are satisfied that there is no merit in this insistence and it is disallowed.

II. Counsel for defendant asks this court to reverse the judgment of ouster for the reason assigned that the circuit court had no jurisdiction to hear and try the cause. This position is stated in this language:

“Respondent has undertaken to prosecute this election contest under authority of section 5924, Revised Statutes 1909, but that section enumerates and specifies *eo nomine* the offices it was intended to cover, and the office of constable is excluded.”

After a careful consideration of that statute we are satisfied that the position of counsel is correct, and that it does not confer jurisdiction upon the circuit court to try a contested election case for the office of constable; but counsel for plaintiff does not seem to question the soundness of that position, but bases the jurisdiction of the circuit court upon sections 7633 and 2757, Revised Statutes 1909. They read as follows:

"Sec. 7633. In the city of St. Louis, the duties and services required by chapter 28, Revised Statutes of 1909, of the county clerk shall be performed by the register of said city, and those required to be performed by the county court shall be performed by the mayor of said city, except in case of a tie or contested election, which shall be tried in the circuit court; and, so far as applicable, said city shall be considered as a county; and likewise a district in said city shall be held to be the same as a township in said chapter.

"Sec. 2757. At the general election to be held in 1890, and at each general election every two years thereafter, the qualified voters of each township in every county in this State shall elect a constable, who shall be a resident of the township for which he is elected, and who shall hold his office for two years and until his successor be elected and qualified: Provided, that in townships that now contain or may hereafter contain a city of over one hundred thousand and less than three hundred thousand inhabitants, and which has been or may hereafter be divided into justice of the peace districts, the constabulary districts of said township shall be made to conform to and be coextensive with such justice districts; the county court shall appoint an additional constable for each of said districts, who shall, in addition to his other qualifications as herein provided, be a resident of the district for which he is appointed or elected, who shall hold his office until the next general election, at which time there shall be elected in all such townships a constable for each of said districts. The judges and clerks of election shall certify the same to the clerk of the county court, and in case of a tie or contested election, it shall be determined by that tribunal."

In considering these statutes it should be borne in mind that when the county government of a part of St. Louis County was abolished and the city of St. Louis substituted therefor through the means of the Scheme and Charter, they were enacted as a part of the law carrying those changes into effect and prescribing what

existing duties should be performed by State and city officers which were formerly performed in that territory by State and county officers. By reading the first section quoted it will be seen that the design of the Legislature in enacting the statute was, not to create new duties, but only to designate the officers whose duty it was made to perform the services which had been previously created by chapter 28, Revised Statutes 1909. That statute in express terms provides that within the city of St. Louis all of the services required to be performed by the county clerk shall be performed by the city register and those required to be done by the county court shall be performed by the mayor of the city except in case of a tie or contested election, which shall be tried in the circuit court.

It will be observed that this statute did not provide for contesting the election of a constable or any other officer, but simply that the trial in such cases shall be had in the circuit court. In other words, that statute does not create an action to contest the election of a constable in the city of St. Louis, but simply provides that such action (if it exists) shall be brought in the circuit court. That is too clear for argument; and if the action exists it must be found in some other statute of the State.

Nor does section 2757, before quoted, have any application to the case at bar. That section expressly limits its operation to townships having a city of over one hundred thousand and less than three hundred thousand inhabitants. That statute could only apply to St. Joseph and Kansas City and not to the city of St. Louis, for we will take judicial notice of the fact that the latter city has a population far in excess of three hundred thousand, yea twice, if not three times, that number.

A similar question came before this court in the case of *State ex rel. v. Hopkins*, 87 Mo. 519, l. c. 527. In that case the Legislature, without conferring jurisdiction upon justices of the peace to try cases enforcing tax liens in favor of the State, simply assumed they

Turpin v. Powers.

possessed such jurisdiction and enacted that "in all cases before justices of the peace where suit is brought for the enforcement of liens as above, where summons shall have been issued against any defendant," he not having been found, then an order of publication to issue, etc. In discussing that question the court, in speaking through NORTON, J., said: "The amendment thus made does not confer any jurisdiction upon justices of the peace, but simply provides the mode of exercising a jurisdiction which the General Assembly took for granted had been conferred, but which in fact had not been conferred," etc. The court then held the judgment void because the justice had no authority to try the cause. The same doctrine is announced in the following cases: *State ex rel. v. Slover*, 126 Mo. 652, l. c. 663-4; *Postmaster General v. Early*, 12 Wheat. l. c. 148, opinion by Chief Justice MARSHALL.

Under this view of the case as previously stated the circuit court of the city of St. Louis had no jurisdiction over the subject-matter of this suit.

III. Independent of the foregoing, I have carefully gone through this record, read the briefs and arguments of counsel and investigated the authorities cited, and as a result thereof I am clearly of the opinion that there is no merit in plaintiff's case and that the defendant was duly elected to the said office of constable.

We have been cited to no other statute creating this character of action, or, as counsel for defendant puts it, providing any machinery for such a contest; nor have we been able to find such a statute after a careful search therefor.

For the reasons stated the judgment is reversed and the petition for the contest is dismissed. *Walker, J.*, concurs; *Graves, C. J.*, concurs in separate opinion in which all concur.

GRAVES, C. J. (concurring).—I shall not attempt to review the statutes discussed by my learned brother Woodson, nor to give an expression to an opinion thereon.

Turpin v. Powers.

Contestant filed a blanket notice of contest. It covers a vast number of charges, most of which were never after adverted to in the case. It should be added that this voluminous notice nowhere alleges that contestee, Powers, had accepted the office or was in fact claiming the same. This may be by the wayside.

Contestee's answer was a denial of the things charged in the notice of contest. This was preceded, however, by a challenge to the jurisdiction, which challenge has been kept alive all through the case.

Upon the first report of the Election Commissioners, contestee had a majority of 54. The circuit court directed a recount and comparison of the ballots, and **void** upon such recount, by the report of the **Ballots.** Election Commissioners, the contestee still had a majority of six. The circuit court after having gone through all of the ballots to which objections were made by either side finally found that contestant Turpin had been elected by 27 votes. In a memorandum filed with his judgment he states in detail his reasons for counting and rejecting the different classes of challenged votes. If therefore it appears that he has improperly counted more than 27 votes for Turpin, the majority for Turpin is gone, and the contestee should win. There is one class of 38 ballots, which were rejected by the election judges in the court for this office, and which were counted by the learned circuit judge for contestant Turpin, which in my judgment settles this case. The learned trial judge says that on 36 of these 38 votes, the name of the voter appears on the bottom of the ballot, and that on two of them the name of the voter appears to be written on the dotted line under the name of Turpin.

A reading of the record shows a sparring match between counsel for the respective parties as to these ballots, and the finding of the learned trial judge shows some sparring also. Counsel for contestant when offering the ballot would call it a ballot with the name of the voter written on the bottom of it. The position of counsel for contestee was that the extra name was written under the caption "Constable" and that made three

Turpin v. Powers.

names thereunder, when the voter could not vote for but two, and that under the express terms of the statute, the votes were invalid. Their position is thus stated:

“Mr. Lashly: It is our position that the Board of Election Commissioners has no power to refer to the poll books for the purpose of finding out whether the name written was the name of the voter or of some other person, that the order of the court for re-count expressly forbade that, that the law forbids it, that even if the Election Board should determine whether the name under the caption ‘constable’ was the name of the voter or not, and even if it should appear that it was the name of a voter, a man has a right to vote for himself, and if he writes his name under the caption for the office in contest it constitutes three votes for that contested office, and therefore under the statute the ballot cannot be counted for either party.”

This objection was carried throughout the record, as to this class of votes. The court in his findings fails to find that the last caption on the ticket was that of constable. We have before us photographs of both the Democratic and Republican tickets used in this election. Upon each, the last caption reads: “For constable, 4th District (vote for two).” This caption is near the bottom of the ticket. Below it on the Republican ticket appears the name of “Floyd E. Bush” and “Charles H. Turpin” and below each name is a dotted line. Just below the name of Charles H. Turpin, and the dotted line thereunder, is a small blank space, before the bottom or end of the paper ballot is reached. It will be noticed that Turpin’s name is the last upon the ballot. In 36 of these 38 ballots the extra name was written below the dotted line, and in two of them on the dotted line just beneath Turpin’s name, but in all 38 the extra name was in fact under the caption on the ticket. These facts fully explain the sparring of counsel. Under these facts, if we had a ballot upon which the name of Turpin had been erased and the name of Powers had been written thereunder, although not on

the exact dotted line, there would be no question that Powers would be entitled to the vote.

The question here is, does the addition of this extra name, leaving the other two unscratched, invalidate the ballot.

We think so. Section 5909, Revised Statutes 1909, reads:

"If a ballot should be found to contain a greater number of names for any office than the number of persons required to fill such office, it shall be considered as fraudulent as to the whole of the names designated to fill such office, but no further; but no ballot shall be considered fraudulent for containing a less number of names than are authorized to be inserted."

In each of these 38 ballots appears three names under the caption of constable, when there should have been but two, and under the statute, *supra*, the ballots are fraudulent and should not have been counted for Turpin. Our statute, *supra*, is but the expression of a general rule of law. Thus in *McCrary on Elections*, section 533, it is said:

"It is well settled that where a limited number of persons are to be chosen to fill a given office—as, for instance, where the law provides for the election by the same constituency of two Representatives in the State Legislature—a ballot containing the name of a greater number for that office is void. It was accordingly held in *People v. Loomis*, 8 Wend. 396, that where the number of constables to be chosen was limited to four, ballots containing the names of five persons designated as voted for for that office cannot be canvassed, but must be rejected.

Nebraska has practically the same statute as ours, and in *State ex rel. Valentine v. Griffey*, 5 Neb. 1. c. 166, it is said:

"Again, each one of these ballots contains the names of two persons, and as this is a greater number than is required to fill the office, it is fatal to the validity of the ballots. The act entitled 'an act to provide a general election law,' in section thirteen, provides that

Turpin v. Powers.

‘whenever a ballot shall contain a greater number of names for any one office than the number of persons required to fill that office, it shall be deemed fraudulent as to the whole of the names for that office.’ ”

To like effect are, *People v. Loomis*, 8 Wend. 396; *Clark v. Robinson*, 88 Ill. 498; *Blankinship v. Israel*, 132 Ill. 514.

That there were but two constables to be elected for the district is clear. That there were three unscratched names under the title “For Constables, 4th District” upon each of these thirty-eight ballots there is no question. That the ballots can not be counted for either of the three, under both our statute and the general rule is likewise clear. Rejecting these 38 votes counted for Turpin by the learned trial judge, as we think they must be rejected, Powers would be elected by eleven votes.

The learned trial judge predicates his ruling in counting these votes on the case of *Lankford v. Gebhart*, 130 Mo. 621. In that case the voters had written their names on the back of the ballots. This was the sole point ruled there. That this case is no authority here is too plain for argument. In the instant case these 38 voters had the right to write under the caption “For Constables, 4th District” the name of any person or persons that they desired to cast their ballot for at such election. This has been consistently ruled since *Bowers v. Smith*, 111 Mo. 1. c. 52, whereat we said:

“By our Constitution general elections are held at certain fixed dates, and the right of suffrage is expressly secured to every citizen possessing the requisite qualifications. The new ballot law cannot properly be construed to abridge the right of voters to name their public servants at such elections, or to limit the range of choice (for constitutional offices) to persons nominated in the modes prescribed by it. Nominations under it entitled the nominees to places upon the official ballots, printed at public expense; but the Missouri

voter is still at liberty to write on his ballot other names than those which may be printed there."

Whilst he may write on other names, if he wants his ballot to be effective he must not leave under the caption a greater number than is necessary to fill the office. In the instant case each of the ballots would have been legal had the voter, when he wrote under the caption the name he did write, taken the trouble to scratch the name of Charles H. Turpin. He did not do it, and thus left three names under the caption, when there should not have been but two.

But it is urged that the names thus written under the caption were the names of the respective voters, and that this changes the situation. It does not change the legal situation in the least. Each voter had the right to vote for himself for constable, if he so desired. He had the right to write his own name for that office under the caption for that office, and had he scratched the name of Turpin, there would be a legal ballot, with one vote each for Bush, the other candidate with Turpin, and for the voter who wrote in his own name under that of Turpin. This is clear. That the three names on the ballot were under the caption for constable is clear from numerous photographs of ballots, in the record. These 38 votes were wrongfully counted for Turpin.

A casual examination of other contested votes impresses us that there were many more than the thirty-eight votes, *supra*, counted for Turpin, that were wrongfully counted for him, but we shall not go further, because these are decisive. We therefore concur in that portion of Judge Woodson's opinion wherein he says that there is no merit in contestant's claim of election, and think that to end a long drawn out fight, judgment should be entered here in favor of the contestee, holding that he was legally elected to the office, and against contestant for costs. It is so ordered.

All concur in these views.

In Matter of ASSESSMENT OF COLLATERAL INHERITANCE TAX in Estate of CHARLES CLARK; GRACE CLARK, Appellant.

Division Two, March, 16, 1917.

1. **COLLATERAL INHERITANCE TAX: On Annual Income.** A bequest of an income for life, or till the legatee's divorce and remarriage, payable annually in monthly installments by a trustee in such sums as he shall deem advisable and just, out of an estate devised in trust for that sole purpose, is not subject to a collateral inheritance tax under Secs. 309-331, R. S. 1909.
2. ———: ———: **Vested Estate: Contingency.** If property is bequeathed to a trustee with directions to pay annually to a named legatee such a part of the income as the trustee deems advisable and just, the bequest vests and takes effect in immediate possession; and therefore Sec. 314, R. S. 1909, which provides that if the estate be one wherein possession is postponed or contingent the collateral inheritance tax shall not be due until the beneficiary obtains possession of the property, does not impose a tax upon such vested income.
3. ———: ———: ———: **Indefinite Amount.** If the amount of income which the legatee will annually receive is impossible of ascertainment, Sec. 310, R. S. 1909, affords no basis for the imposition of a collateral inheritance tax.
4. ———: ———: ———: **Appraisement.** Since Secs. 322 and 323, R. S. 1909, require the property to be appraised "at its clear market value at the time of the death of decedent," those sections afford no basis for imposing a collateral inheritance tax upon an annual income vested *in praesenti* whose amount is indefinite in that it is to be whatever sum the trustee may deem advisable and wise.
5. ———: ———: ———: ———: **Amount and Duration.** To determine the present value of any limited estate, income or annuity, both the annual amount and the duration thereof must be known; or, the amount must be known and the duration be capable of being averaged by the mortality tables.
6. ———: **Statutes: Construction.** Taxation statutes are to be strictly construed, but not so far or so technically as to defeat the intention of the Legislature. But if it cannot be said from an examination of them that the Legislature intended to impose a tax on incomes of a certain sort, an attempted taxation of them cannot be upheld.

In re Estate of Clark.

7. ———: ———: **Ascertainment Each Month.** To hold that the statutes provide for an ascertainment of the tax due each month from an annual income, to be paid in monthly installments, where the trustee is by the bequest to determine how much will be paid each month, is to give a violent construction to the statute, and one not warranted by its terms.

Appeal from St. Louis County Circuit Court.—*Hon. John W. McElhinney*, Judge.

REVERSED AND REMANDED (*with directions*).

T. K. Skinker for appellant.

(1) The interest of Mrs. Grace Clark in the estate of the decedent is not subject to any collateral inheritance tax, because (a) it is not a life estate or interest; (2) it may determine upon either of two events that may happen before the expiration of her life, namely, upon her marriage, or upon a suit being brought against her to subject her interest to execution for debt; (3) it is indeterminate and uncertain, depending for its value upon the discretion of the Mississippi Valley Trust Company, the trustee named in the will of the decedent. Appellant was the daughter-in-law of the decedent. *Hinds v. Stevens*, 45 Mo. 211; *State ex rel. v. Scullin*, 266 Mo. 319; *Cooley on Taxation*, chap. 12, p. 269; *Disston v. McClain*, 147 Fed. 114; R. S. 1909, secs. 310, 314; *State ex rel. v. Henderson*, 160 Mo. 190. (2) If her interest is liable to the tax at all, the appraisement and levy must be postponed until the expiration of her estate. *Sloane's Estate*, 154 N. Y. 109; *Millward's Estate*, 27 N. Y. Supp. 286; *Babcock's Estate*, 65 N. Y. Supp. 926; *Meyer's Estate*, 83 N. Y. App. Div. 381; *Roosevelt's Estate*, 143 N. Y. 120; *Curtis' Estate*, 142 N. Y. 219; *Davis' Estate*, 149 N. Y. 547; *Howell's Estate*, 69 N. Y. Supp. 1016; *Estate of Simon*, 7 Ohio N. P. 667, 39 Week. Law Bull. 369; *Billings v. People*, 189 Ill. 472; *Howe v. Howe*, 179 Mass. 546; *McLemore v. Raine's Estate*, 131 Tenn. 637; *State v. Bridgers*, 161 N. C. 246; *Com. v. Cambron*, 158 Ky. 577; *Matter of Morss*, 85 N. Y. Misc. 676; *Matter of Granfield*, 79 N. Y. Misc. 374;

In re Estate of Clark.

In re McLane's Estate, 142 N. W. Supp. 788. (3) The trial court erred in directing the assessment and levy of the tax on the installment plan. (a) Appellant's estate is not an expectancy within the meaning of Sec. 314, R. S. 1909. 2 Blackstone Com., 163; Black's Law Dict., title, Expectancy; Anderson Law Dict., title, Expectancy; 3 Words and Phrases, title, Expectancy. (b) A liberal construction of the Collateral Inheritance Tax Law is not allowable. State ex rel. v. Scullin, 266 Mo. 319; State ex rel. v. Railroad, 251 Mo. 134; State ex rel. v. Alt, 224 Mo. 513; Matter of Cager, 111 N. Y. 350; Disston v. McClain, 147 Fed. 116; Matter of Curtis, 142 N. Y. 219; Matter of Roosevelt, 143 N. Y. 120; Matter of Zborowski, 213 N. Y. 109; Stewart v. See, 21 Mo. 515. (c) Monthly sworn return not called for by said section 314. (d) Assessment cannot be made in dribblets. Matter of Howe, 112 N. Y. 100; State ex rel. v. Henderson, 160 Mo. 190; State ex rel. v. Switzler, 143 Mo. 287.

O. M. Barnett and *Ernest A. Green* for the curators of the University of Missouri.

The bequest in this case is to a daughter-in-law of the testator. The property passes to her by the will of Charles Clark. Sec. 309, R. S. 1909, says that "all property which shall pass by will . . . other than to or for the use of the father, mother, husband, wife, legally adopted children or direct lineal descendant of the testator . . . shall be and is subject to the payment of a collateral inheritance tax." It is, therefore, clear that the intention of the Legislature was to tax every bequest under a will which passes to a daughter-in-law. It is the duty of a court to construe the provisions of a statute so as, if possible, to give effect to the intent of the Legislature. Decker v. Diemer, 229 Mo. 324; State v. Probate Court, 112 Minn. 279. It is to be noted that if the State is to be at all sure of collecting the tax, it is absolutely necessary that the same be paid upon each installment as it is delivered over. No lien exists by which the State can protect itself, and, furthermore, the

will itself, by its very terms designates the payments to be made to Mrs. Clark to be such as the trustee may deem advisable for her support. Therefore, if the trustee is correct in its judgment as to the amount necessary for her support, she will spend all the money which is paid to her, and at the conclusion of her tenancy there will be nothing left out of which to pay the tax. Authorities upon inheritance tax statutes seem to unite on the proposition that in cases of this sort it is not necessary to defer the collection of the tax until the expiration of the estate, but on the other hand that it is proper to collect the same upon each payment as it is made. Blackmore and Bancroft on Inheritance Tax, page 186; State ex rel. v. Probate Court, 100 Minn. 192; State ex rel. v. Probate Court, 112 Minn. 279.

FARIS, J.—This is an appeal from the circuit court of St. Louis County in a proceeding commenced originally in the probate court of that county to appraise the interest of Grace Clark (hereinafter for brevity called appellant) in the estate of one Charles Clark, deceased, for the purpose of collecting the collateral inheritance tax alleged to be due thereon. The probate court found against appellant and ordered that the "Mississippi Valley Trust Company as trustee for said Grace Clark shall comply with the terms of the will of said Charles Clark with respect to said Grace Clark, and at the time of making payment of any sum of money, or its equivalent under and in compliance with the provisions of the will of said Charles Clark, deceased, by which Grace Clark is constituted a beneficiary, deduct and retain five per cent of said payment and within thirty days after such deduction pay said five per cent deduction as collateral inheritance tax under and pursuant to the provisions of sections 309 to 331 of the Revised Statutes of Missouri for 1909, to the collector of revenue of the county of St. Louis, and State of Missouri, which said five per cent of said payment or payments is hereby levied, assessed and fixed by the court as the inheritance tax payable under said sections to the State of Mis-

In re Estate of Clark.

souri." Said probate court further ordered in and by its judgment that as to all sums theretofore paid out by the Mississippi Valley Trust Company as trustee, if said sums had been paid for as much as thirty days, said trustee should pay to the collector of St. Louis County five per cent. thereon.

Upon appeal to the circuit court of St. Louis County the order of the probate court in the case was affirmed. But said circuit court, however, went a little more into detail in its judgment and among other things pertinent made findings and ordered thus:

"The court doth further find from the evidence that prior to the date on which this appeal was to it submitted, an aggregated sum of \$5,416.66 $\frac{2}{3}$, consisting of thirteen monthly payments of \$416.66 $\frac{2}{3}$ each, beginning May 18, 1912, and including the payment of May 18, 1913, had been paid by said Mississippi Valley Trust Company under the terms of the will of Charles Clark to Grace Clark, and the court doth assess the value of each of said payments at \$416.66 $\frac{2}{3}$, and doth levy thereon a collateral inheritance tax of \$20.83 $\frac{1}{3}$, and in the aggregate doth levy a collateral inheritance tax of \$270.83 upon said aggregate sum of \$5416.66 $\frac{2}{3}$, which sum of \$270.83 the court doth order and adjudge that said Mississippi Valley Trust Company shall forthwith pay to the collector of the revenue of St. Louis County, Missouri. *The assessment of all further payments to Grace Clark under said will and the levy of collateral inheritance tax thereon is hereby postponed until the times hereinabove specified, at which the amounts of said payments may be determined.* It is ordered and judged that appellant, Grace Clark, pay the costs and charges herein incurred on the appeal to this court." (Italics ours.)

From this order and judgment of the circuit court of St. Louis County the appellant, after the usual motions, appealed.

The facts upon which the case turns, outside of the bare statement of the steps taken and the results thereof, will fully appear in the provisions of the will of said

Charles Clark, deceased, who in his life time was the father-in-law of appellant. Dying, said testator left a will wherein and whereby certain provisions were made for the support of appellant during her life, unless and until she married again. These provisions we will set out in full in our discussion of the case, wherein they will be more apposite to an understanding than if they were set forth here.

It is fairly clear that two questions are presented by this appeal: (a) Does appellant come within the class of legatees whose legacies are chargeable? (b) Is the provision for her, or the bequest which she takes, such a one as the statute makes taxable, and if so how and when by statute must payment of the tax be made?

I. Is the provision made for her within the class of bequests, or estate, or incomes, which the statute makes chargeable with this tax?

The provisions of the will of testator, Charles Clark, pursuant to which appellant takes the estate, or provision about which this controversy revolves, are abridged and set out in appellant's brief thus:

**Taxation
of Income.** "Clause 8 provides that, after the payment of certain special legacies, the estate shall be divided into two parts. One-half of the estate is to be held by the Mississippi Valley Trust Company as trustee for the use and benefit of Lewis Vaughan Clark and Mrs. Grace Clark, his wife, upon the trusts named in that clause. Omitting details in regard to management of that estate, clause 8 proceeds:

"The net income deriving (derived) from the trust estate is intended for the support and maintenance of my son, Lewis Vaughan Clark and Grace Clark, his wife, during their lives and the life of the survivor of them, and to such issue as may be born of their marriage or any subsequent marriage of my said son, Lewis Vaughan Clark, during the minority of such issue.

"The said trustee, from the net income derived from the trust estate as aforesaid, shall annually pay in equal

In re Estate of Clark.

monthly installments during the lives of said Lewis Vaughan Clark, and Grace Clark, and to each, severally and separately, in such proportions as it may deem advisable and just, for their joint and separate support, considering their joint or several comfort, necessities and station in life, such part or all of said income, as it may determine to be necessary.

“In the event of the death of my son, Lewis Vaughan Clark, Grace Clark surviving him, leaving no issue by their marriage or any subsequent marriage of my said son Lewis Vaughan Clark, such part or all of the income as said trustee may deem necessary or reasonable or just for her support and maintenance, considering her circumstances and station in life, shall be paid to her at all times as such trustee may determine. If issue, either by the present or any subsequent lawful marriage of my said son, Lewis Vaughan Clark, should survive him also, then such income shall be apportioned by said trustee between such issue and said Grace Clark, until her death and the attainment of majority by the youngest issue aforesaid, as such trustee may, in its judgment, determine.

“While in this paragraph eighth of this will, I have heretofore provided for the said Grace Clark during her life, it is my will and I direct that, if she should marry again after the death of my son, Lewis Vaughan Clark, or after a legal separation between them, then at the time of her marriage, her interest in the trust estate shall end, with the same effect as if she had died.

“The beneficiaries shall not encumber and sell or convey or in any manner anticipate his or her interests in the trust fund, principal or income, and any such sale, transfer, assignment, or encumbrance shall be utterly void; and if any creditor attempt by suit or otherwise to subject the interest of any beneficiary to the payment of any of the debts of such beneficiary, then and thereafter the trustee shall not be obliged to make payments as hereinbefore provided, to such beneficiary or beneficiaries respectively, but during the rest of the period during which the trust is to continue, may in its

discretion apply such sums, or such part thereof as it thinks reasonable, for the support or comfort of the beneficiaries, or the family of the beneficiaries, respectively. The trustee shall semi-annually render to the beneficiaries a written statement and account of the transaction of the trust estate during the preceding half year."

There are certain codicils attached to the will, which deal with the interest of testator's son Lewis Vaughan Clark, the husband of appellant, but counsel seem to take the view, in which after a careful reading we acquiesce, that these codicils do not in any material wise affect the provision made for appellant. We might say in passing that one provision of these codicils emphasizes the view, which, however, we understand counsel for appellant to concede, that the trustee was to deal separately and not jointly with the proceeds of the trust estate, that is, that it was to pay to appellant and to said Lewis Vaughan Clark each a sum "such as the trustee may deem advisable for his or her support." The codicil referred to simply commutes the sum which may be paid from any source (including an income from his deceased mother's estate) annually to Lewis Vaughan Clark *for his separate support* at a total of \$6000. Since any residue goes back into the corpus of the trust fund the codicil's provision does not affect appellant's interest in any manner, so far as we are here concerned. In other words, and reduced to its simplest analysis, is a bequest of an income for life, or till the legatee's divorce and remarriage, "payable annually in monthly instalments" by a trustee "in such sums as the trustee shall deem advisable and just," out of an estate devised in trust for that sole purpose, taxable under the terms of the Collateral Inheritance Tax Statutes? [Secs. 309-331, R. S. 1909.]

The will of Charles Clark, deceased, set forth certain contingencies, on the occurrence of which it may be said to be inferable that the income accruing to appellant might be increased to a sum equal to the whole income from one-fourth of the estate. But any change seemingly worked in the question stated by these con-

In re Estate of Clark.

tingencies will on inspection be found apparent and not real, since, in all cases any increased payment by the trustee to appellant is contingent upon her necessities as interpreted by the trustee's discretion, thus leaving the entire matter as nebulous as before. In short, no subsequent contingency so modifies the situation as to render inaccurate our statement above of the ultimate question involved.

Attending now specifically to the last question put, since in the view we take of the case it may be disposed of upon that point alone: We are of the opinion that the income here provided for appellant vests in possession at once. Its taking effect as a bequest of an income is not postponed to the happening of any contingency whatever; it does not depend upon the falling in of any prior estate for either life or years, nor is it a remainder. It takes effect in immediate possession, just as, in all respects and just as surely as, any other devise or bequest of an estate in trust, wherein the income alone is to be paid to the *cestui que trust*. Only the amount of the income and the duration of the right to enjoy it are doubtful, or subject to be either changed or defeated—short of appellant's death—by contingencies. The contingency of duration for life or less, can be defeated only by appellant's own voluntary act; that of uncertainty of amount of the annual income depends upon the judgment (*semble*, to be exercised annually) of the trustee as to the amount which will be required for the support of the appellant.

Even a casual reference to the question presented in the light of the statute shows clearly that there has been no method provided by the Legislature fixing the time, or manner of the collection of an inheritance tax on this sort of income. [Secs. 310 and 314, R. S. 1909.] The two sections last-above cited contain all of the legislative methods devised to that end. Section 310, *supra*, provides the manner in which these taxes are to be collected upon bequests vesting in immediate possession; but a mere casual examination of this section shows that it can not be applied to the facts before us. Here the cor-

pus of the estate vests in the trustee. Part of the income is to be used for the support of Lewis Vaughan Clark and part for the support of the appellant. But not necessarily is all of the income from one-half of the whole estate to be used for both, or an equal half thereof to be used for appellant; only such part of the whole estate (one-half in fact of what testator left) is to be used for appellant (and to make up for Lewis Vaughan Clark a total annual income of \$6000, as above said) as her necessities may require, according to the best judgment and discretion of the trustee. The residue of the income, after deducting the amount contingently applicable to appellant's use, goes back to the corpus of the estate. So, the amounts which appellant will receive annually are impossible of ascertainment. Likewise, the duration of the payment of this unascertainable sum is impossible of determination. If it were for the life of appellant, and the annual sums necessary for her support known, no difficulty would be presented. A mere computation according to the mortality tables, would settle it. It is plain to be seen that collection can not be made upon any basis, pursuant to the provisions of section 310.

Looking at the facts presented in the light of section 314, we also meet insuperable difficulties. This section in pertinent substance provides that if the estate be one wherein possession is postponed, or contingent, the tax shall not be due till the beneficiary gets possession of the property, and shall be assessable upon the value coming into possession. But we have seen that here possession is neither postponed nor contingent. Possession, that is the right to the income, is *instantly*; duration of enjoyment alone is contingent and liable to defeat. Besides, in order to thus secure deferment of assessment and collection (present collection on a just and equitable basis under section 310, being as above shown, impossible) and as a condition precedent to deferment of instant payment, the trustee must make and file a bond (section 310, *supra*), in three times the amount of the tax. In case of a failure so to file a bond,

In re Estate of Clark.

the tax becomes immediately due and payable, and in such event is then to be reckoned "on the clear market value of the estate." Since, as we have tried to make plain, the clear market value of the estate is impossible of ascertainment, as is likewise the annual amount of the income and the duration of the payment thereof, it is neither possible to fix the amount of the bond, nor to ascertain the amount of the tax on the clear market value of the estate.

While sections 322 and 323 of this statute may upon casual inspection seem to provide an equitable working plan by which to fix and levy this tax on appellant's income, a more careful examination of the above sections discloses the fallacy of this view. Section 322, *supra*, provides *inter alia* that the probate court "shall, as often and whenever occasion may require, appoint a competent person as appraiser, to fix the valuation of estates which shall be subject to the payment of any tax imposed by this article." But coming to an actual appraisement such appraiser is, by further provisions of this section, required to appraise the property "at its clear market value, at the time of the death of the decedent." Under the facts before us we have seen that such an appraisement is here impossible.

Pursuing the matter of appraisement further, section 323, *supra*, provides that upon the coming in of the appraiser's report the probate court having before him an appraisal fixing the value of the property "at the clear market value at the time of the death of the decedent," shall proceed to fix the cash value of the estate and assess the amount of tax to which it is liable. This section further provides for the determination of the value of "every limited estate, income, interest or annuity dependent upon any life or lives in being by the rule, method and standards of mortality and value which are employed by the superintendent of the insurance department in ascertaining the value of policies of life insurance and annuities." The mere statement of the above rules providing for the appraisement of the property and for the manner of fixing the tax due thereon

shows the utter futility of attempting to apply it to the facts in hand. For we know as well as any actuary could know, that in order to determine the present value of any limited estate, or income, or annuity, both the annual amount and the duration thereof must be known; or, the amount must be known and the duration be capable of being averaged by the mortality tables. Here both of these facts are unascertainable and it manifestly follows that the provisions of neither of the two above sections can be made to apply to the facts in the instant case.

Statutes by which the State taxes the property of the citizen are to be strictly construed. [Blakemore and Bancroft, Inheritance Taxes, 32; Matter of Enston, 113 N. Y. 174; Matter of Vassar, 127 N. Y. 1; 37 Cyc. 1556.] This rule is not, however, to be followed so far and so technically as to defeat the intention of the Legislature. [State ex rel. v. Switzler, 143 Mo. 287.] But the case presented is so palpably a *casus omissus*, that it can not be said that the Legislature had any intention to tax an income of that sort here under discussion, otherwise they would have provided some fair and equitable way to do so. No method of taxing this income can be found in these statutes anywhere, which even measurably fits the facts confronting us.

Concerning the Collateral Inheritance Tax Statutes of the State of New York of 1885, from which State our own statutes were largely taken, and of which they are substantial rescripts (Laws New York, 1887, chap. 713, p. 921 et seq.), in a case wherein the impossibility of enforcing the collection of the tax upon a similar so-called expectancy *was urged as rendering the whole law unconstitutional*, the New York Court of Appeals said:

"The learned brief submitted by Mr. Hun, on the part of the appellants, points out many imperfections in this act, and shows that there will be great embarrassment and difficulty in executing the act in the cases of contingent remainders and expectant estates, and in some other cases. The criticisms made by him upon the act are well worthy of the attention of the Legisla-

In re Estate of Clark.

ture. But even if in some of the respects pointed out by him it should be found that the act is inoperative and impracticable, yet on that account we see no reason for condemning the entire act. If it should be wholly inoperative in cases of contingent and expectant estates and in some other cases mentioned by him, yet it can operate without difficulty or embarrassment in the great majority of cases coming within its purview; a majority of persons having property die intestate, and a majority of those disposing of property by will do it by simple bequests or devises, and the cases of contingent and expectant estates are not very common. There is no reason, therefore, for condemning the whole act because possibly in some cases it could not have operation according to the intent of the Legislature." [Matter of McPherson, 104 N. Y. l. c. 324.]

The judgment *nisi* provided for the ascertainment of the tax due each month, bottomed upon the sum which the trustee should in its discretion decide to pay appellant for her support for that month. For, so runs the memorandum filed below: "Then it becomes known and certain and the amount of the tax is also then known and can be determined by the court, and is required by the law to be deducted and withheld and paid in thirty days by the trustee to the collector." We have shown that no statutory method has been provided, or exists by which the situation here presented is in any sense met, so that the plan adopted below is the result of the most violent construction. Such violence of construction we do not deem warranted in order to enforce a statute operating *in invitum*, as this and other taxing statutes do.

It is manifest that such a method of ascertainment and payment of the amount of tax due would be expensive in fees and burdensome in the extreme. Learned counsel for appellant insist that the monthly outlay in probate court fees necessitated by the order *nisi* would be \$4.45 upon a total monthly tax, as developed by past experience in this case, of \$20.83. In short, the costs entailed in fees would amount to more than twenty per

cent of the monthly tax. Whether learned counsel is in error or not as to the mathematics of his argument, it is plain that such an order, when nowhere provided for by the statutes, is too inequitable and unjust to sanction; and that the rule which enjoins upon us the duty to enforce the intention of the Legislature (in collecting this tax, not in selecting those liable to pay it), is not so flexible as to embrace a case so flagrant as this. The law does not require us to leave the statute and go into the field of invention to find a way to tax this income.

The remedy lies with the Legislature. The statutes of 1887 of the State of New York, from which our statutes on the subject largely come, have been so many times re-written and amended since we adopted this ancient law upon the subject as seemingly to permit (since the case of *Matter of McPherson*, *supra*, was decided) the taxing of an income similar to the one under discussion. Likewise, is this also the case in many other jurisdictions. [Cf. *State ex rel. v. Probate Court*, 112 Minn. 279; *Crompton's Estate*, 10 Pa. County Ct. 443; *Chisholm v. Shields*, 67 Ohio St. 374; *People v. McCormick*, 208 Ill. 437; *In re Babcock*, 81 N. Y. App. Div. 645; *Billings v. People*, 189 Ill. 472; *Howe v. Howe*, 179 Mass. 546; *Matter of Sloane*, 154 N. Y. 109.] But the condition of our statute regarded, to hold the income here involved as liable to this tax would necessitate so violent a construction of our statute as to amount to judicial legislation.

Having reached this conclusion we need not concern ourselves with the other questions reserved for discussion, since this one disposes of the case.

It results that the case must be reversed and remanded with directions to the court *nisi* to enter judgment for the appellant. Let this be done. All concur.

MURRAY PHILLIPS, Appellant, v. NANNIE E. BROUGHTON et al.

Division Two, March 16, 1917.

1. **EJECTMENT: Former Default Judgment as Bar.** If a former default judgment adjudging plaintiff to be the owner of the land and forever enjoining defendants from asserting any title thereto is valid, it forever precludes defendants from introducing evidence of title in them at any time prior to its rendition.
2. ———: **Former Judgment Void Because of Insufficient Prayer: Sec. 2092, R. S. 1889, and Sec. 2100, R. S. 1909.** If the only relief prayed for in the petition in the former action begun in 1908 was that "the defendants may be summoned to show cause why they should not bring an action to try their alleged claim or title thereto, if any they have," the default judgment adjudging plaintiff to be the owner of the land and forever enjoining defendants from asserting title thereto was void, because the petition clearly shows the action was instituted under Sec. 2092, R. S. 1889, which was repealed by the Act of 1897, Laws 1897, p. 74, and because if the judgment granted other relief than that prayed for it would not be binding upon defaulting defendants, since it is expressly provided by Sec. 2100, R. S. 1909, that in such case the relief granted "shall not be other or greater than that which he [the plaintiff] shall have demanded in the petition."

Appeal from Butler Circuit Court.—*Hon. J. C. Shepard*, Judge.

AFFIRMED.

Oliver & Oliver for appellant.

(1) Where a court has jurisdiction over the subject-matter of a suit and of the parties, its judgment is binding on the parties until set aside or annulled by appeal. Such a judgment may be irregular and voidable, but it is not void and cannot be attacked collaterally. *Chouteau v. Gibson*, 76 Mo. 46; *Murphy v. DeFrance*, 101 Mo. 151; *Hardin v. Lee*, 51 Mo. 244; *Reed Bros. v. Nicholson*, 158 Mo. 631; *State v. Wear*, 145 Mo. 203; *Black on Judgments*, sec. 170. (2) This is true, although the defense sought to be set up in the second

suit was not set up in the first suit, provided such defense came within the scope of the inquiry of the first suit. *Donnell v. Wright*, 147 Mo. 647; *Railroad v. Traube*, 59 Mo. 362; *Tuttle v. Harritt*, 85 N. C. 456; *Hotel Assn. v. Parker*, 58 Mo. 327; *Hamilton v. McLean*, 169 Mo. 51; *Railroad v. Levy*, 17 Mo. App. 507; *McCalley v. Wilburn*, 77 Ala. 549; 2 *Black on Judgments*, sec. 697; *Freeman on Judgments* (4 Ed.), sec. 36. (3) The issues tendered by plaintiff's petition to quiet title in 1908 were: 1st, ownership in fee of the land described; 2nd, possession of the land described by plaintiff; 3rd, assertion that defendants set up some claim to the lands described, adverse to the plaintiff. These were the jurisdictional and issuable averments in the plaintiff's petition. They conform to the requirements of the statute. To these charges no denial was interposed or made by either of the adult defendants. The minor defendant did deny them. The cause was submitted on the testimony offered by the plaintiff, and the court found all of the facts set up in plaintiff's petition to be true. Judgment was entered, quieting the title in the plaintiff, and enjoining and prohibiting the defendants from further asserting claim or title to the lands. The defendants could have denied: (a) plaintiff's ownership of the land; (b) plaintiff's possession of the land; and: (c) averred ownership by adverse possession for ten years, if they had so elected; refusing to plead, they are estopped and barred from doing so in this case. *Hamilton v. McLean*, 169 Mo. 73, and authorities cited under point one. (4) In an action to quiet title, all matters affecting the title of the parties to the action may be litigated and determined, and the judgment therein is final and conclusive. A general finding of title in the plaintiff and consequently of no title in the defendant is a conclusive and binding decision against the defendant on the question of title from whatever source it may be derived, and forever estops him from asserting a claim of title which existed at the time of the finding and the judgment. This is the very purpose of the statute. 2 *Black on Judgment*, sec. 664,

p. 800; Sec. 650, R. S. 1899; Sec. 2535, R. S. 1909. (5) The petition in the suit to quiet title was in accord with the provisions of the statute, except the prayer. The circuit court of New Madrid County, however, disregarded so much of the prayer as was inappropriate and unauthorized under the averments of the petition and the law, and entered a decree quieting title in plaintiff. The court had the right to grant plaintiff any relief "consistent with the case made by the plaintiff and embraced within the issues." The character of an action is determined by the facts stated in the petition and not by the prayer for relief. Sec. 76, R. S. 1899; Sec. 2100, R. S. 1909; Sec. 767, R. S. 1899; Sec. 2091, R. S. 1909; *State ex rel. v. Land & Lumber Co.*, 161 Mo. 671; *Sharkey v. McDermott*, 91 Mo. 657; *Reed v. Bott*, 100 Mo. 67; *Comings v. Railroad*, 48 Mo. 517; *Lumber Co. v. Jones*, 220 Mo. 197. (6) The judgment of the circuit court of New Madrid County of September, 1908, adjudging that the plaintiff was the owner in fee of the land in suit, and further adjudging and decreeing that the defendants and each of them be forever enjoined, restrained and forbidden from asserting any right, title, claim or interest in and to the land, is just as binding as any other judgment affecting real estate. The statute specially provides that such a judgment "shall have the same force and effect as a judgment obtained under the provisions of the Code of Civil Procedure." Sec. 651, R. S. 1899; Sec. 2536, R. S. 1909.

I. R. Kelso and J. G. Miller for respondents.

(1) A suit to quiet title does not contemplate a judgment for possession, and that a writ of ouster go. "The precise point has been ruled upon and is no longer open." *Mann v. Doerr*, 222 Mo. 11. (2) The Act of 1897, concerning suits to quiet titles, by declaring that it is enacted for the purpose of "taking the place of statutes which fail in their object," expressly repeals Sec. 2092, R. S. 1889 (Sec. 647, R. S. 1899), since there is no other section to which it can refer. *Merriweather v. Love*, 167 Mo. 514. (3) We call attention to some of

the cases decided by the courts of this State under Section 2092, above mentioned, and under which appellant attempted to institute suit to quiet title after this statute had been repealed. (a) In order to institute a proceeding under this section the petitioner must be in actual possession of the premises. *Von Phul v. Penn*, 31 Mo. 333; *Rutherford v. Ullman*, 42 Mo. 216; *McGrath v. Mitchell*, 65 Mo. App. 626; *Root v. Mead*, 58 Mo. App. 477; *Chaffin v. Clark*, 33 Mo. App. 99; *Thompson v. Newberry*, 93 Mo. 18. (b) A proceeding instituted under this section is not for the purpose of settling the title to the premises in the first instance, but is only preliminary to an action which the defendant or adverse claimant may be ordered to bring for that purpose. See cases above cited; also *Colline Assn. v. Johnson*, 120 Mo. 299. (c) On the trial of the issues formed on the petition, evidence showing title in fee in the plaintiff, is not proper; it being only necessary for him to show actual possession of the premises, claiming either an estate of freehold, or an unexpired term of not less than ten years. *Dyer v. Baumeister*, 87 Mo. 134. (d) A possession by the plaintiff that is merely nominal, or wrongfully obtained for the purpose of instituting a suit so as to require the defendant to bring a suit to assert his title, is not sufficient to justify an order against the defendant to institute a suit. See last case above cited. (e) This section was not intended to authorize a proceeding that would be a substitute for the action of ejectment.

WILLIAMS, J.—This is a suit in ejectment to recover the north fractional half of the southwest fractional quarter of fractional section 13, township 22, range 13 east, containing 141.1 acres, situated in New Madrid County, Missouri. The suit was transferred on change of venue from the New Madrid Circuit Court to the Butler Circuit Court, where trial was had before the court, without a jury, resulting in a judgment for the defendants. Plaintiff duly perfected an appeal.

The petition is in usual form.

The answer is in five counts, admits possession of the property in defendants, but denies each and every other allegation in the petition. The ten-year and thirty-year Statutes of Limitation are also pleaded as defenses.

The fifth count of the answer is in the nature of a cross-bill, and alleges that the defendants are the owners of and in possession of said land and that they are informed and believe that plaintiff claims some title or interest in said land, the nature and character of which is unknown to defendants, but that defendants are informed that plaintiff is basing his claim to said land on a decree entered in the circuit court of New Madrid County at the September Term, 1908, in a proceeding wherein Murray Phillips was plaintiff and these present defendants were defendants. It is alleged that said decree is void because the court entering the same had no jurisdiction over the property described in said decree, and that said decree was not responsive to the petition attached to the copy of the summons served on the defendants, but wholly failed to describe the property as set out in said decree; that defendants failed to file any answer or appear in any manner in said suit because they, in good faith, believed that said suit was not intended and did not in any manner affect any of the land described in this suit. In the prayer the court is asked to cancel and set aside said decree and to ascertain and determine the title to said land.

The reply denied the new matter set up in each count of the answer.

Plaintiff introduced evidence showing that the paper title to said land was in the plaintiff. The evidence further shows that said land was timbered land and none of it was prepared for cultivation and that a short time prior to the institution of this suit the record owner had some men on the land clearing it and that about six or eight acres had been cleared when defendants ordered said men off the place and took possession of the same. The disputed land is situated between the land owned

by plaintiff and land owned by the defendants. Plaintiff testified that he did not know that this woodland, around which the defendants had a fence, was a portion of his land until a surveyor (the date of the survey is not given) ran a line and it was discovered that the defendants' fence extended a quarter of a mile too far south; that it is wood land and unoccupied.

The evidence upon the part of the defendants tended to establish the following facts:

The plaintiff was recalled for further cross-examination and testified that the suit which he had formerly instituted in New Madrid County against the same defendants involved the same property as is now involved in this suit.

L. F. Steele, a surveyor of New Madrid County, testified that he had known the land for three or four years and that during that time Mr. Broughton had been in possession of it. On cross-examination he testified that when he made the survey he found a fence along the south side of the land in suit (the south side adjoined the undisputed land of plaintiff); that it was not much of a fence, and it looked like a part of the fence had been torn down; that the fence on the west side was apparently a good one, but that the witness did not go around the north or east side of the tract.

Henry E. Broughton, Collector of New Madrid County for the past fourteen years, testified that said land was used by the defendants as a pasture during the last ten or fifteen years; that in the year 1897 the witness and his brother (his brother, now deceased, being the person under whom defendants claim) were partners, engaged in buying and selling cattle, and at that time a fence was built around the land in question and they kept cattle in there. The fence which they built contained nine or ten wires, and that prior to the building of this fence there was a three or four-strand wire fence around this land, but the witness did not know how long it had been there or who built it. The witness testified that the land in dispute had been known as the Broughton land ever since the witness, who was fifty-four years

Phillips v. Broughton.

old, could remember. This witness testified that defendants paid taxes on about sixty-one acres of this disputed land.

Defendants introduced in evidence two deeds conveying to persons under whom they claimed about fifty-six acres of the land in dispute. It does not appear that the grantors in these deeds had any record title, and from the showing made their interest would amount to only color of title.

H. E. Broughton, Jr., one of the defendants, testified that the defendants or those under whom they claimed built a nine-wire fence around the disputed property twelve or fourteen years ago and that the land had been enclosed by a fence ever since and had been used by the witness's father as a pasture; and that there was a fence around the place before the nine-wire fence was built. Upon cross-examination this witness testified that his brother ran plaintiff's negroes out of this land when they were there clearing the same; that the defendants, and those under whom they claim, claimed to own all of this timber land enclosed by the fence and used the same as pasture "during all this time."

Defendant Nannie Broughton testified that the defendants claimed to own all the property inside of the fence and that they first learned that their right was questioned by plaintiff about two years ago when he began clearing it up; that when they found out that he was claiming the land they stopped him. This witness testified that she was served with a summons in the first suit instituted by the plaintiff in New Madrid County against these defendants; that when the summons and copy of the petition was served upon her she asked the sheriff what it meant and the sheriff told her that it meant that "Murray wants to borrow money and it seems the Hunter heirs are all mixed up in a law suit some way and he can't get it unless the Hunter heirs all sign this paper;" and that she thought the sheriff knew what he was talking about and, for that reason, she didn't go to court and make a defense in the suit. The witness testified that her husband died February 10,

1904, and she kept a diary of everything that occurred; that in 1891 there were three strands of barb wire put around the woods pasture to keep the mares and colts in there, and that in 1897 the nine-strand wire fence was put around the land so they could pasture cattle in there.

Defendants introduced in evidence the summons and the petition in the first suit between these parties, which resulted in the decree in favor of the plaintiff entered by the New Madrid Court at its September Term, 1908. Said petition, omitting formal parts, was as follows:

"Plaintiff says that the defendant Nannie Broughton is the widow of Arthur Broughton, deceased, and that the other defendants except Alpheus Moore, the husband of said Ethel Broughton, are the children of said Arthur Broughton, deceased.

"Plaintiff says that he is the owner in fee and in possession of the following described land situated in New Madrid County, Missouri, to wit:

"The southwest fractional quarter of section thirteen (13), township twenty-two (22) north of range thirteen (13) east.

"Plaintiff says he is credibly informed and believes that defendants make some claim to the estate of plaintiff in said above-mentioned lands, and therefore prays that defendants may be summoned to show cause why they should not bring an action to try their alleged claim or title thereto, if any they have."

Defendants also offered in evidence the decree in said cause, which, omitting caption, is as follows:

"On this day comes the plaintiff by his attorney and Lelia M. Broughton, a minor, by her guardian *ad litem*, T. J. Brown, and it appearing to the court that the defendants, Mrs. Nannie Broughton, Edward S. Broughton, Henry E. Broughton, Jr., Jennie Broughton, Ethel Moore and Alpheus Moore, her husband, and Hunter Broughton, have been duly and personally served with process herein, they are called and come not but make default.

"Wherefore, on motion of the plaintiff by his attorney, this cause is taken up and submitted to the court upon the pleadings and the evidence adduced by the plaintiff, and the court being fully advised in the premises doth find: that the allegations in plaintiff's petition are true; that the plaintiff is the owner in fee of the southwest fractional quarter of section 13, township 22 north of range 13 east in New Madrid County, Missouri.

"Wherefore it is ordered, adjudged and decreed by the court that the defendants, and each of them, be forever enjoined, restrained, forbidden and prohibited from asserting any right, title, claim or interest in or to the southwest fractional quarter of sec-

Phillips v. Broughton.

tion 13, township 22 north of range 13 east in New Madrid County, Missouri, which would in any way abridge, modify, restrict or interfere with the free, full and complete fee ownership thereof by the plaintiff Murray Phillips, and that the costs of this proceeding be taxed against the plaintiff."

In rebuttal plaintiff introduced in evidence tax receipts showing that plaintiff had paid the taxes on this land and other land for the years 1901, 1902, 1903, 1905 and 1907. Plaintiff offered other witnesses who testified that for the last twelve or fourteen years the land in question had been open most of the time, so that stock could go in and out whenever it pleased and that other persons' stock would go in there; that it was the same as an open woods; that sometimes Frank Phillips would fix the fence and it would be up for a few days and then be down again; that some of the fence had nine wires and some three wires, and that there had never been anybody living on the place or in possession of it. One witness testified that he asked defendants if he could turn some stock on the land in question and that they said he could. Another witness testified that the fence around the land in question was down in several places and that: "You might say that there was no fence particularly around it. It has been in that condition since the year 1904. My stock run backward and forward into it; go in there every morning and come out at night. It is just the same as an open woods. Anybody's stock in that neighborhood can go in there the same as any other old deadening." On cross-examination this witness testified that the land had been used as Broughton's pasture ever since the witness knew it in 1904.

I. The result to be reached in this opinion will depend upon the validity or invalidity of the default judgment of the circuit court of New Madrid County, Missouri, entered at its September term, 1908. If that judgment

Former
Judgment
as Bar.

is a valid one the defendants in this action would be precluded from introducing evidence as to the title of this land at a period prior to the rendition thereof, and upon the record here presented the present judgment in favor of

defendants would be erroneous, because not supported by sufficient evidence. If, on the other hand, the judgment is null and void, then, we think, there are sufficient facts disclosed in the foregoing statement of facts to warrant the trial court in entering the judgment it did in favor of defendants, on the theory that defendants hold the title through adverse possession.

II. Is the judgment of 1908 null and void? Upon careful consideration, we have reached the conclusion that it is.

Said judgment and the petition upon which it is based will be found copied in full in the foregoing statement. It will be noted that the *only* relief prayed in said petition was as follows: "Plaintiff
Void Judgment.- . . . therefore prays that defendants may be summoned to show cause why they should not bring an action to try their alleged claim or title thereto if any they have." Summons was issued and, together with a copy of said petition, was duly served upon the defendants. The defendants did not appear (with the exception of one minor defendant who appeared by guardian *ad litem* and filed answer), and a judgment by default was entered against them, whereby they were "forever enjoined, restrained, forbidden and prohibited from asserting any right, title, claim or interest therein."

A mere reading of said petition shows clearly that it was instituted under the provisions of section 2092, Revised Statutes 1889, which was carried forward (erroneously however) into Revised Statutes of 1899 as section 647, and the only relief there prayed was the relief contemplated by said section. The decree grants also only such relief as was by said section provided.

Section 2092, Revised Statutes 1889, had, however, by the Act of 1897 (see Laws 1897, page 74) been repealed long before the suit was instituted. [Meriwether v. Love, 167 Mo. 514.]

That being true the court was without authority to grant the relief as prayed or as contemplated by said repealed statute and the judgment in so far as it under-

Phillips v. Broughton.

took to grant the relief afforded by that statute, and as prayed, was, therefore, null and void.

It is, however, contended by appellant that the relief granted was authorized by section 650, Revised Statutes 1899, the same being the Act of 1897, *supra*. We think it clearly appears from a reading of the decree, however, that the court did not attempt to grant the relief provided by section 650, *supra*, this because the title to the land was not specifically determined and adjudged as is contemplated by said section, but the decree merely went to the extent of *enjoining* the defendants from asserting title thereto as was contemplated and provided *only* by section 2092, Revised Statutes 1889, which, as we have above seen, was not then in force.

Furthermore even though it should be conceded that the decree granted *other* relief from that which was prayed, the *other relief* decreed would not be binding upon the defendants *defaulting*, this because of the express provisions of a statute, to-wit, section 2100, Revised Statutes 1909, which provides that upon default, such as occurred in that case, the relief granted "shall not be *other* or greater than that which he [plaintiff] shall have demanded in the petition, as originally filed and served on defendant." [See also *Janney v. Spedden*, 38 Mo. 395, l. c. 402; *Leavenworth Terminal Ry. & B. Co. v. Atchison*, 137 Mo. 218, l. c. 230; *Russell v. Shurtleff*, 28 Colo. 414.]

The cases cited and relied upon by appellant in support of the contrary contention are not *default* cases and are therefore not in point here.

The judgment is affirmed. All concur.

THE STATE ex rel. SCHOOL DISTRICTS NOS. 52
and 53 of CASS COUNTY et al., Plaintiffs in Error,
v. LESLIE WRIGHT et al.

Division Two, March 16, 1917.

1. **CONSOLIDATED SCHOOL DISTRICT: Plat: Certainty.** Absolute mathematical certainty in lines and scale in the plats of a proposed consolidated school district required by the statute to be made and posted by the County Superintendent, who is not a surveyor and who is given no fund with which to cause a survey to be made, is not to be expected.
2. ———: ———: **Sufficiency: Purpose.** The plat of the proposed consolidated school district is sufficiently exact within the meaning of the statute if it shows the sections and subdivisions of lands in a manner sufficiently accurate to enable the ordinary citizen to ascertain from an examination thereof whether the boundaries of the proposed district will include his residence or lands so as to make him a voter and a taxpayer in the district. If it does that, and likewise enables the County Clerk to intelligently extend and the Collector to intelligently collect the taxes on the subdivisions of real estate included, it contains all that is necessary.
3. ———: ———: ———: **Bounded by River.** Whether or not the posted plats make the boundary line of the proposed consolidated school district cross the southeast corner of a certain section, or to run thirteen links from the corner, is immaterial, if a certain river or well-known water course is there made the boundary line.
4. ———: **Welfare of Adjoining Districts: Judgment of Superintendent.** In fixing the boundary lines in such a way as in the judgment of the County Superintendent "will form the best possible consolidated district," the statute leaves both the measure of the judgment and the quantum of due regard for the welfare of adjoining districts to his sound official discretion; and the sole way of correcting his exercise of a bad judgment and discretion is the rejection by the voters of the proposition to organize the consolidated district.
5. ———: ———: **Quo Warranto: Substantial Evidence.** A *quo warranto* to have declared illegal the attempt to organize a consolidated school district, is a law case; and if there is substantial evidence that the County Superintendent made effort to obtain facts upon which he might exercise his judgment as to the needs for the district and as to the welfare of the adjoining district, the finding of fact by the trial court that he did all the statute required is binding on the appellate court.

State ex rel. v. Wright.

6. ———: Increased Taxes: Fraudulent Representations of Superintendent. Alleged fraudulent statements made to voters by the County Superintendent before the consolidated district was formed that their taxes would not be increased by its formation more than fifteen or twenty cents on the hundred dollars' valuation, has no place in a *quo warranto* brought against the directors to oust them on the ground that the district was not legally organized, for even if made they are no grounds for outlawing the district.

Error to Cass Circuit Court.—*Hon. B. G. Thurman*,
Special Judge.

AFFIRMED.

Smith & Chastain for plaintiff in error.

(1) The statute under which the district in question was attempted to be organized required the County Superintendent of Schools on receipt of a proper petition to perform these duties: (a) To visit and investigate the needs of the community; and (b) To determine the exact boundaries of the proposed district, doing this so as to get the best possible district, having due regard to the welfare of the adjoining districts. Laws 1913, p. 722, sec. 3. (2) To this provision of the statute effect should be given by the court, because not an impractical thing to be done, and no different intent can be found either expressed or implied in the act. *Bank v. Repley*, 161 Mo. 131; *State v. Hunter*, 188 Mo. 529. This effect will be given even if the court should be of opinion the requirement is an unwise one. *Gist v. Construction Co.*, 224 Mo. 384. (3) These statutory requirements are necessary conditions precedent to the organization of a district; in fact, jurisdictional. *State ex rel. v. County Court*, 66 Mo. App. 101; *State ex rel. v. Higgins*, 71 Mo. App. 185; *State ex rel. v. Siebert*, 97 Mo. App. 212, 219; *State ex rel. v. Page*, 107 Mo. App. 217; *State ex rel. v. Metzger*, 26 Mo. 65; *State ex rel. v. Wilson*, 216 Mo. 277; *State ex rel. v. Woods*, 233 Mo. 377; *State ex rel. v. Jones*, 181 S. W. 51. (4) The undisputed evidence is that: (a) The exact boundaries of the district were never determined by the superintendent. Exact means

accurate, strictly correct, precisely fitting, not differing in the least. 2 Ency. Dictionary, p. 1962. (b) He did not investigate the needs of the community having due regard to the interests of adjoining districts. To investigate is to "examine and inquire into closely." 3 Ency. Dictionary, p. 2726. (5) The only "determining" of the boundaries of the district by the superintendent was the making of the plats, none of which were alike, but all agreed that at the southeast corner of section 9, Bates County, the map was inexact to the extent of more than thirteen chains. (6) The court erred in admitting the plats in evidence, because they did not show the boundaries of the district. Authorities under proposition one and two. (7) The court erred in excluding evidence as to fraudulent representations of the County Superintendent to the effect that the organization of the district would not increase taxation. State ex rel. v. Woods, 233 Mo. 337.

C. A. Denton and W. E. Owen for defendants in error.

(1) The statute providing for the creation and organization of consolidated school districts is a progressive act in keeping with the forward movement of the State and country at large, and before the court will declare the organization of a district under it invalid, or the law itself, the reasons therefor should be clear and unanswerable, and the court will scrutinize very closely all of the proceedings, and be fully satisfied that a clear case is made out against the legality of the organization of the district, as the ruling, if adverse to the district, prejudicially affects the rights and interests of the State as well as the inhabitants of the district and creditors thereof. State ex rel. v. Job, 205 Mo. 34; State ex rel. v. Westport, 116 Mo. 595; State ex rel. v. Gordon, 261 Mo. 649; Board of Commissioners v. Peter, 253 Mo. 520; State v. Baskowitz, 250 Mo. 82; State ex rel. v. Warner, 197 Mo. 656; State ex rel. v. McIntosh, 204 Mo. 602; State ex inf. v. Henderson, 145 Mo. 336. (2) No strict or technical construction is to be put upon

State ex rel. v. Wright.

the statute authorizing the organization of consolidated school districts. It was designed as a plain workable method for organizing larger districts with greater educational advantages, by plain, honest worthy citizens not specially learned in the law. State ex inf. v. Jones, 266 Mo. 201; State ex rel. v. Job, 205 Mo. 34; State ex rel. v. Andrea, 216 Mo. 636; School Dist. v. Hodkin, 180 Mo. 79; School Dist. v. Pace, 113 Mo. App. 140; State ex inf. v. Morgan, 187 S. W. 57. (3) The important thing for the voter in each district to know was how his district was to be affected by the creation of the new district, or by change of the boundary, and what particular territory is included in the new district, or what particular territory his district would lose in the creation of the new one, or by changing the boundary line. State ex rel. v. Job, 205 Mo. 28; Mason v. Kennedy, 89 Mo. 30; School Dist. v. Sims, 193 Mo. App. 480. (4) The plat of the proposed consolidated school district made by the County Superintendent is the instrument designated by the statute to be posted for the information of the voters as the territory therein included. And if it sufficiently gives this information it has served its purpose, and where permanent monuments like well defined water-courses are given as part of the boundary line, it will be a sufficient designation of such boundary. Monuments control courses and distances called for. Laws 1913, p. 721; Campbell v. Clark, 8 Mo. 553; McGill v. Somers, 15 Mo. 80; Kronenberger v. Hoffner, 44 Mo. 185; Jones v. Poundstone, 102 Mo. 240; Whitehead v. Ragan, 106 Mo. 231; Smith v. Catlin Co., 117 Mo. 438; Harding v. Wright, 119 Mo. 1; Johnson v. Boulware, 149 Mo. 451; Peterson v. Beha, 161 Mo. 513; Clamorgan v. Railway, 72 Mo. 139; Brown v. Huger, 21 How. 305; State ex inf. v. Glaves, 186 S. W. 685.

FARIS, J.—This is a proceeding by *quo warranto*, filed by the prosecuting attorney of Cass County, at the relation of two certain school districts and some sixty-two tax-paying citizens of that county, against defendants in error here, who were defendants below, to oust

them from their offices as directors of a certain consolidated school district. The trial court refused to grant the writ of ouster and plaintiffs sued out and now prosecute their writ of error.

The action turns upon the question whether said consolidated school district was legally organized. There is but little dispute about the facts. Such of these facts as are necessary to an understanding of the points raised are substantially as follows: A petition containing the requisite statutory number of signers and which is conceded by plaintiffs to be sufficient in form and substance and sufficiently signed, was presented to one T. J. Walker, who was then superintendent of public schools of Cass County, requesting him to proceed officially under the provisions of the Laws of Missouri, 1913, page 721 et seq., to organize a consolidated school district in Cass and Bates counties, with the center of such proposed school district at or near the town of Archie in Cass County. Thereupon the County Superintendent personally went into the neighborhood to be affected and from which the territory to compose the proposed consolidated district would have to be carved, for the purpose of examining the situation. Touching his acts in this behalf, he says: "I went to see these citizens and talked the matter over with them; observed the country and the lay of the land and kept in mind the different boundaries that were to be included within the proposed consolidated district and kept in mind the territory that was to be embraced within the district, and later I took the plat and in my office laid out the boundaries, knowing as I did the boundaries of the district. I undertook to have in mind the welfare of the adjoining districts and that I must not cripple any adjoining districts or leave them in a condition where it would be impossible for them to have school facilities." This witness, who is not a party to this action in anywise, testifying as to the manner, nature and extent of his investigations, also said: "I went with Mr. Pitcher to Archie where we drove over a large part of the territory and talked with a lot of resident citizens whom I told, as I visited them,

what was my purpose; that I wanted to see the sentiment of the community as to whether they really wanted a consolidated district and high school facilities, telling them what in my judgment would be the advantages of such an organization; to most of them I called attention to the fact that there was at that time no high school existing between Drexel and Garden City, in Cass County, a stretch of country perhaps twenty-five miles from one town to another. Whenever a man expressed himself as favorable to it, I asked him if he would sign a petition as an evidence of his good faith, and a great many more were added, to the number of about seventy."

There is no controversy as to the sufficiency of the notices, nor as to the posting thereof, nor as to the number of plats which were prepared by the County Superintendent and caused to be posted at the requisite statutory number of places. These plats were roughly and somewhat inartificially drawn upon blanks containing numbered sections, townships and ranges, all of which blanks were filled in as the situation required. The plats as posted and filed show the southeast corner of the proposed district to be on a certain creek, or water course, known as Mormon Fork of Grand River, which point, the testimony shows, was supposed to be coincident with the southeast corner of section nine, though it developed upon exact measurement that the southeast corner of said section nine was some thirteen chains east of this creek. Touching it, however, as well as regarding other contested points, the County Superintendent says that he was not personally acquainted with the lines bounding the school districts affected in Bates County; that he made inquiry as to all of these facts and afterward prepared the plats by the exercise of his best judgment as to what was the proper manner of running the lines.

The plat hereinafter set forth shows the inclusion of an eighty-acre tract, which has the effect to produce a seeming inequality in the western boundary of this district. The testimony of defendants, which was, in its entirety as to the facts, corroborated by plaintiffs, shows

that this tract of land is vacant and uncultivated, and situate in a small, weak common school district. For these reasons the County Superintendent included the above tract in the consolidated district. Regarding a certain eighty-acre tract—seemingly on the easterly side of the watercourses which partly bounded the consolidated district on that side—and a two-hundred-acre tract, being all that was left of a certain common school district in Bates County, both of which tracts were omitted, the County Superintendent testifies as to the former that he might have included it if he had known the true facts, but that such omission was justified possibly by the fact that these watercourses often become impassable on account of floods. As to the omitted two-hundred-acre tract he says his best judgment was to omit it, which he did, and that this judgment would not have been changed by knowledge (which he did not have at the time) that it was all that was left of a former Bates County common school district. The record does not contain any sufficient evidence by which the alleged bad judgment of the County Superintendent is demonstrated, or the judgment upon which he acted in the three certain behalves mentioned is impeached.

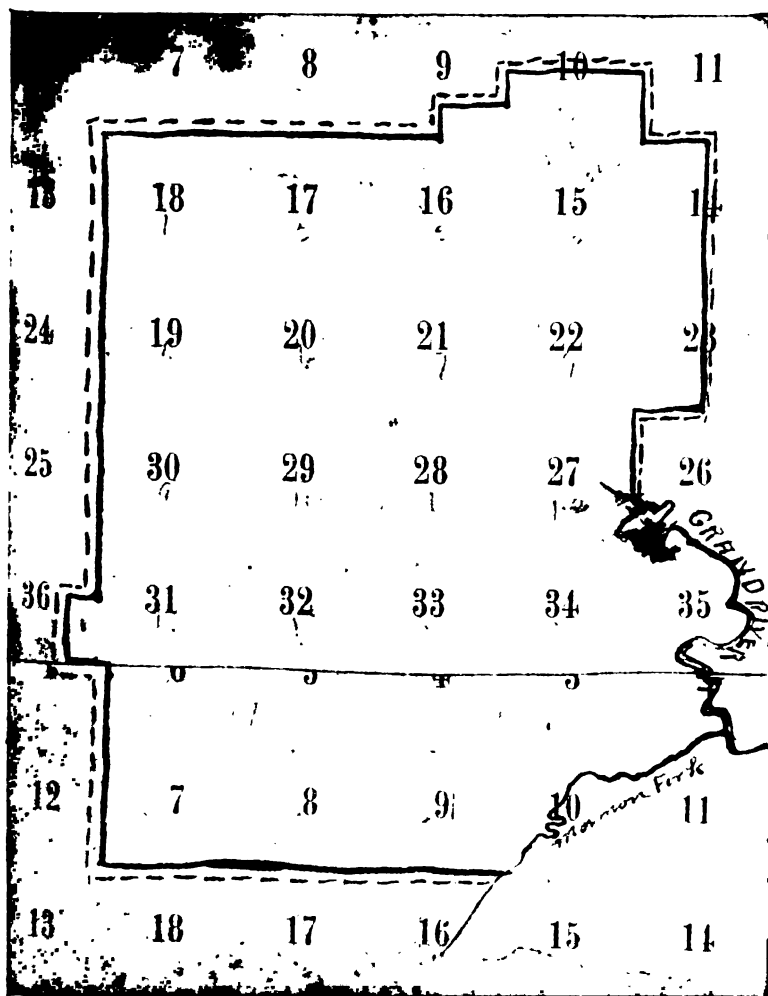
The court, as stated, refused to oust the defendants, thereby holding, in effect, that the district was lawfully organized. This is the decisive question and the sole question sought to be settled by this proceeding. Other facts tending to illuminate it will be found in the opinion.

Looking at the brief filed by learned counsel for plaintiffs in error in the light provided by the terms of our Rule 15 (adopted April 10, 1916), we find only the below points mooted: (a) That the exact boundaries of the district were never determined by the County Superintendent of Schools; (b) The County Superintendent did not investigate the needs of the community with due regard to the interests of adjoining districts; (c) the court erred in admitting the plat in evidence, because it did not show the boundaries of the proposed district; (d) the court erred in admitting evidence that some of

State ex rel. v. Wright.

the individual plaintiffs participated in and voted at the special election; and (e) that it was error to exclude evidence that the County Superintendent made alleged fraudulent representations as to the additional cost in taxes which would be entailed by the establishment of the proposed consolidated district.

I. Coming to a consideration of the complaint that the exact boundaries of the proposed district were never determined by the County Superintendent, we note that seven plats were caused to be posted by this official.



Plat. These plats were headed: "Plat of Proposed Consolidated District No. 2, of Cass and Bates Counties." In the north margin thereof the ranges correctly numbered 31 and 32, respectively, and in the east margin the townships likewise correctly numbered 42 and 43, respectively, were shown, with the words "Cass County" written in said east margin under the words "Township No. 43." In the south margin, appeared the legend: "Scale 1 inch=1 mile." All of the above matters and things are omitted from the plats shown by plaintiffs in error in their abstract. In all other respects the above plat which we take from the abstract, is a true representation of the boundaries of said proposed district.

Learned counsel for appellants concede that the notices posted were in proper form and that the petition for the organization of the district was duly filed. The point as made goes to the sufficiency of the above plat. The alleged phase of inexactitude touching the plats is that these plats fail to show the boundaries of the district. The contention upon which this charge is bottomed, so far as we are able to gather, is that while the southeast corner of the district as the plat shows it, seems to be the southeast corner of a certain section nine, this is not the case in fact; because while upon the plat Mormon Fork of Grand River which actually forms the southeast boundary of the district, seems to cross the section line at a place coincident with the southeast corner of said section 9, it in fact crosses the south line of said section thirteen chains west of the southeast corner thereof. Regardless of this fact we yet think this plat, which we show above, was under the statute (Laws 1913, p. 722, sec. 3), a sufficient showing of the boundaries of the proposed district. It may be a matter of judicial regret that the above section of this act which designates all of the necessary statutory requirements of things to be done in order to lay out, organize and record a consolidated district, did not go more at length into the details of the procedure for such organization. But these things were for the Legislature and not for us.

Reference to the language of the act shows the only requirements of investigation and examination to be that: "On receipt of said petition, it shall be the duty of the County Superintendent to visit said community and investigate the needs of the community and determine the exact boundaries of the proposed consolidated district. In determining these boundaries, he shall so locate the boundary lines as will in his judgment form the best possible consolidated district, having due regard also to the welfare of adjoining districts."

While the above language is all that the act contains as to the initial manner of "determining" the boundaries, the context, we think, shows that the word "determine" is not used in its strict sense of "ascertaining to a mathematical certainty;" but it means that the County Superintendent shall "settle upon and decide" where such boundaries shall be. For it will be noted in determining these boundaries he is required to "so locate the boundary lines as will in his judgment form the best possible consolidated district." Neither the district nor the boundaries thereof are required to be surveyed, for no provision exists to pay for any surveying and none is mentioned in the act. The plats which are to be filed and posted are likewise, from the context, to be prepared by the County Superintendent. For while he may procure others to make them, it is yet made his duty to post them, and, since nothing is said as to paying any other person or officer for making these plats, the duty to make them, or to procure them to be made without incurring any expense therefor, clearly falls upon him. Since we know what the duties and the statutory requirements as to eligibility of a County Superintendent of schools are, we know that he is not required to be either a surveyor, a civil engineer or a skilled draftsman. Therefore we would not expect absolute mathematical certainty in lines and scale in the plats filed and posted by the County Superintendent. Such a plat is sufficiently exact within the meaning of the statute when it shows the sections and subdivisions

thereof in a manner sufficiently accurate to enable the plain, ordinary citizen (State ex rel. v. Graves, 268 Mo. 100) to ascertain from an examination thereof whether the boundaries of the proposed consolidated district will include his residence or lands so as to make him a voter and a taxpayer in the district. It follows that if a plat under this act does this much, and in so doing, it likewise enables the County Clerk to intelligently extend and the Collector to intelligently collect taxes on the subdivisions of real estate included, this is all that is necessary. We think the plat posted and filed and above shown did this. The error as to where the southeast corner of section nine is, affects the matter in no material way when viewed in the light of the objects intended to be accomplished. The Mormon Fork of Grand River is shown to be a watercourse and a permanent monument. Even the casual observer can see from the plat that the district runs for a southeast boundary line or corner, to this watercourse; that it includes all lands up to this creek and no more, and that the same is true of Grand River itself. No courses or distances are called for; if they were this creek would control and delimit such calls and form a natural monument even as against such calls. [Whittelsey v. Kellogg, 28 Mo. 404; Smith v. Catlin Land & Imp. Co., 117 Mo. l. c. 444.] Since these natural monuments form the southeastern and part of the eastern boundaries of the proposed district, it is evident that no lands which lie east of this creek and of this river are embraced within the district. So also it is not difficult to ascertain what sections or subdivisions of sections of land lie on the westerly side of these watercourses. Surely any voter may be presumed to know whether he lives and his land lies on the east side or the west side of streams like these. Besides, a mere reference to the above plat and a statement of the contentions of the learned counsel for plaintiffs show in the light of our recent rulings, that the point should be ruled against plaintiffs (State ex rel. v. Graves, *supra*), which we accordingly do.

II. Coming to the contention that the County Superintendent did not sufficiently examine into the effect of the proposed consolidated district upon certain adjoining common school districts in Bates County: The statute which we quote above is, we repeat, regrettably meager in its details; it relegates the matter of fixing the boundaries of the district, that is, *the creation of the district itself*, to the judgment of the County Superintendent; it lays down no hard-and-fast rules, nor any certain method for him to follow, but within the limits of so locating "the boundary lines as will in his judgment form the best possible consolidated district," in the light of a "due regard for the welfare of adjoining districts," leaves both the measure of judgment and the quantum of due regard to the welfare of adjoining districts to the sound official discretion of the County Superintendent. The question of the correctness of the judgment exercised and the regard by him had to the welfare of adjoining districts is required (as the sole way of correcting his exercise of bad judgment and discretion) to be passed on by the voters at a special election held for this purpose. In this case the voters approved the district and its boundaries as an exercise both of good judgment and due regard. In addition, there was substantial testimony, which we set out in our statement of facts, that the superintendent made efforts to obtain facts on which, *caeteris paribus*, he might have been able to exercise the required statutory quantity of judgment and due regard. The learned trial court found from the facts shown that he did all that the statute required him to do. No instructions were asked or given; this is not an equity suit (*State ex rel. v. People's Ice Co.*, 246 Mo. 168), so we are in this condition of the record, bound by the holding of the court *nisi*.

III. It is contended that the trial court erred in refusing to admit proffered evidence that the County Superintendent made fraudulent statements as to the additional cost in taxation which would be entailed by the

State ex rel. v. Wright.

**Misrepresentation
as to Increased
Taxes.**

formation and operation of the proposed consolidated district. This contention we think is erroneous both as to the facts and the law. Some three or more witnesses were permitted to state that representations were made by the County Superintendent that the increased cost by way of taxation to the owners of taxable property to maintain the proposed consolidated district would be only ten or fifteen cents on the hundred dollars' valuation, but that the increase had run much higher in some at least of the territory included. The single objection made by plaintiffs to testimony of this sort was sustained, because the question was leading. Afterwards the matter was gone into fully and some three or more witnesses testified about it. That any such inquiry in a proceeding like this was wholly incompetent, is manifest. The alleged fraudulent statements were made, according to the witnesses, while the superintendent was "visiting the community" and endeavoring to "investigate the needs" thereof. The petition by which the move toward the organization of the district was initiated had already been signed and filed. Conceding for the sake of the argument that the County Superintendent did hazard an erroneous guess as to the additional cost which would be entailed and have to be met by taxation, is that any reason why the district should be declared outlawed? At most, what the superintendent did was to make predictions as to future conditions, which it is averred time has not vindicated, and that this was done in order to obtain votes in favor of the district, when the matter should come to be voted on at the special election. We apprehend that such a ground would not avail even in an election contest. If it could even in such an action become relevant, we might view with alarm the grafting upon the right to hold an office the condition that all of the ante-election promises made should in the end eventuate, according to the strictest letter of each voter's memory. Such a view might even be held eventually to extend to the platforms of political parties and there work remediless havoc. But

Schneider v. Kloepple.

be all this as may be, this is a collateral matter sought to be injected into a common law action; the County Superintendent is not a party, but a mere witness in the case; and since it is under the issues irrelevant, he could not be impeached by the inquiry, and for the reasons given in the analogous case of Carder v. Drainage District, 262 Mo. l. c. 555, and the case of State v. Newcomb, 220 Mo. l. c. 63, among many others that could be set down did not time and space forbid, this contention is disallowed.

IV. It was perhaps "immaterial and irrelevant," as the sole objection ran, that certain of the persons who are here objecting as relators participated in and voted at the special election by which the district was
Relators. organized. But this was the only objection made and the court *nisi* did not rule on the point at the time this objection was made, reserving his ruling thereon. He was never afterwards asked to rule, and has not yet ruled on it. So for both or either one of these reasons, we cannot review the point urged.

Other alleged errors reserved by us for discussion, are disposed of by what we have said on other but germane points. We find no error in the record, and hence affirm the case. All concur.

CHARLES SCHNEIDER et al., Appellants, v. FERDINAND KLOEPPLE et al.

Division Two, March 16, 1917.

1. **EVIDENCE: Objection: Raised First on Appeal.** An objection that a will, the common source of title, was not shown to have been admitted to probate, comes too late if made for the first time in appellant's brief.
2. **WILL: Reasons for Devise.** It was reasonable and natural that a devout Catholic, dying without descendants, should devise his real

Schneider v. Kloepple.

estate to his wife, to use as she pleased during her life, the remainder at her death to go to a benevolent association of the church of his faith.

3. ———: **Heirs and Assigns Not Used: Intention.** Although the words "heirs and assigns" are not used, a devise, in the absence of words of limitation, conveys the fee, unless the language employed shows a lesser estate was intended. In the latter case, the lesser estate is created.
4. ———: **Life Estate With Power of Disposal: Remainder: Intention.** The language of a will was: "The real estate I bequeath to my wife Anna Maria Brink to use as she pleases, and at her death what remains is to go to the St. Joseph Catholic Orphan Asylum in St. Louis." *Held*, that an absolute estate in fee was not devised to Anna Maria, but the intention was, by language as clear and unambiguous as the words of creation, to create a remainder; that is, a life estate in her, with power of disposal, the remainder to vest in the Orphan Asylum.
5. ———: **Indefinite Devisee: Erroneous Name.** A will devised a life estate to testator's wife and the remainder to "the St. Joseph Catholic Orphan Asylum in St. Louis, Missouri." At the date of his death there was no legal entity so named, but there was a corporation entitled "The Managers of the Roman Catholic Orphan Asylum of St. Louis," and there was then and has continued to exist since a voluntary unincorporated charitable institution known as "The St. Joseph Catholic Asylum," to the support of which the churches of the diocese, including that in which testator worshipped, contributed, but whether the contributions was made directly or indirectly does not appear. Upon the incorporation of "The Managers of the Roman Catholic Orphan Asylums of St. Louis," the property owned by the St. Joseph Catholic Orphan Asylum and other incorporated orphan asylums in St. Louis was turned over to the archbishop of the diocese as president of "The Managers of the Roman Catholic Orphan Asylums of St. Louis," for the benefit of said orphan asylums, and the property subsequently acquired was so held and used. *Held*, that, in spite of the mistake in naming the devisee, the corporation is entitled to take the devise.
6. ———: ———: **Unincorporated Charitable Institution.** A charitable devise or bequest will be upheld and enforced if made to a voluntary unincorporated association. The corporate character of the devisee is not a prerequisite to the validity of such a devise.
7. ———: ———: **Erroneous Name.** Where a beneficiary is designated in a will by an erroneous name the bequest will not be avoided, if, by means of the name or by extrinsic evidence, the beneficiary may be identified.

Appeal from Maries Circuit Court.—*Hon. J. G. Slate,*
Judge.

AFFIRMED.

Holmes & Holmes and *Lorts & Brewer* for appellants.

(1) The purported will of William Brink was improperly admitted in evidence. It had not been admitted to probate and had not been proven, recorded, certified and attested as required by statute. *R. S. 1909, sec. 564, 549; 565; Charlton v. Brown, 49 Mo. 353; Smith v. Estes, 72 Mo. 310; Farris v. Burchard, 242 Mo. 1; Barnard v. Bateman, 76 Mo. 414; Snuffer v. Howerton, 124 Mo. 637.* (2) The real estate belonging to William Brink, and in the petition described, descended to Anna Maria Brink, his wife. *R. S. 1909, sec. 332; 2 Cyc. 87, par. A; Celis v. Oriol, 6 La. 403; 14 Cyc. 99, note 43, citing Hollingsworth v. Barbour, 4 Pet. (U. S.) 466.* (3) The devise of an estate, with power of disposal, will pass the fee. *Hazel v. Hagan, 47 Mo. 276; Turner v. Timberlake, 53 Mo. 371; Small v. Field, 102 Mo. 104; Green v. Sutton, 50 Mo. 186; Evans v. Folks, 135 Mo. 403; Jackson v. Little, 213 Mo. 589; Cook v. Crouch, 100 Mo. 29; Gannon v. Albright, 183 Mo. 238; State ex rel. v. Tolson, 73 Mo. 320; Roth v. Rauschenbusch, 173 Mo. 582; Yocum v. Siler, 160 Mo. 181; Wead v. Gray, 78 Mo. 59.* (4) The bequest over is void because of indefiniteness of beneficiary, the beneficiary is a private and not a public charity, and no trustee is appointed and no provisions made for its administration. *Heiss v. Murphy, 40 Wis. 290; Underhill on Wills, secs. 811, 818, 826, 906 and 908; 5 Am. & Eng. Ency. Law (2 Ed.), p. 895; 2 Perry on Trusts, sec. 719; Schmucker's Estate v. Reel, 61 Mo. 592; 5 Am. & Eng. Ency. Law (2 Ed.), pp. 937, 939.* (5) When the words of a will at the outset clearly indicate a disposition in the testator to give the entire interest, use and benefit of the estate absolutely to the donee, it will not be cut down to a less estate by subsequent or ambiguous words, inferential in their intent. *Yocum v. Siler, 160 Mo. 281; Small v. Field, 102 Mo. 123; Jarman on Wills, sec. 1135; Gannon v. Albright, 183 Mo. 238; Gannon v. Pauk, 183 Mo. 265; Gannon v. Pauk, 200*

Mo. 75; *Grace v. Perry*, 197 Mo. 559; *Cornet v. Cornet*, 248 Mo. 224; *Killmer v. Wuchner et al.*, 37 N. W. (Iowa) 778.

Pope & Terrill and C. C. Bland for respondents.

Appellants say the devise of an estate, with power of disposal, passed the fee to Mrs. Brink. This would be true if such power had been granted, without restrictions or limitations to its exercise. But unlimited and unrestricted power of disposal was not granted to Mrs. Brink by her husband's will. The power conferred was to use the real estate as she pleases, and at her death what remains to go to the "St. Joseph Catholic Orphan Asylum at St. Louis." The plain intent and purpose of testator was to bequeath his real estate to his wife, not absolutely, but with power to use it as she saw proper, and possibly to convey it at any time during her life. If she did not convey it then it should go to the "St. Joseph Catholic Orphan Asylum of St. Louis." Therefore, under the most liberal construction in his favor the bequest to Mrs. Brink was for her life, with power of disposal at any time during her life, remainder of what was not disposed of by her to the "St. Joseph Catholic Orphan Asylum of St. Louis." Conceding she had this power of disposal, she could only exercise it during her lifetime, and what of the real estate she did not dispose of went to the remainderman. *Mooy v. Gallagher*, 36 R. I. 405; *Kemp v. Kemp*, 111 N. E. (Mass.) 673. But, granting for the argument that Mrs. Brink had a fee simple estate under her husband's will in all of his real estate, she by the second clause of her will adopted that portion of her husband's will, providing that any part of his real estate remaining undisposed of by his wife should go to the "St. Joseph Catholic Orphan Asylum," so that if Mrs. Brink took a fee to the lands of her husband under his will, she by her will passed the fee to the Asylum, or rather to the managing trustees, the corporation designated as the "Managers of the Roman Catholic Orphan Asylum of St. Louis." If the corporation is sufficiently designated in William

Schneider v. Kloepple.

Brink's will as to be identified as the-object of his bounty, the gift was to a public charity. *Baskley v. Douley*, 112 Mo. 561; *Hadley v. Forsee*, 203 Mo. 427; *Russell v. Allen*, 107 U. S. 167; *Festorazzi v. St. Joseph Catholic Church*, 104 Ala. 327; *Schmidt v. Hess*, 60 Mo. 591; *County Court v. Griswold*, 58 Mo. 175; *Missouri Historical Society v. Academy of Science*, 94 Mo. 459; *Hoeffner v. Clogon*, 171 Ill. 462; *Libby v. Tobbein*, 103 Mo. 477; 2 *Perry on Trusts* (3 Ed.), sec. 734; *Schmidt v. Hess*, 60 Mo. 591.

WALKER, P. J.—This is a suit to determine the interest of the parties hereto and quiet the title to certain land described in the petition in Maries County, Missouri. A trial resulted in a judgment for the defendants, from which plaintiffs appeal.

The land described was a part of that of which William Brink died seized in October, 1883. He died testate leaving no children or their descendants. The language of his will in regard to his real property is as follows: "The real estate I bequeath to my wife Anna Maria Brink to use as she pleases, and at her death what remains is to go to the St. Joseph Catholic Orphan Asylum in St. Louis, Missouri."

William Brink died seized of 310 acres of land. His wife conveyed 160 acres of same to one Ben Smith to be held in trust for a boy named Hoffman, whom she was rearing but had not adopted. At her death there remained undisposed of 150 acres of the land, the same being that now in controversy. In October, 1912, the wife died testate leaving no children or their descendants. In her will appears the following: "I wish that my husband's will should be executed according to his intention."

The parties to this suit entered into a stipulation for the purposes of the trial embodying the following facts: "That the fee to the land described in the petition was at the time of his death in William Brink; that he died in October, 1883, and left no children or their descendants surviving him; that Anna Maria Brink was

his wife, who survived him and died in October, 1912, and left no children or their descendants surviving her; that Charles Schneider and Rosa Koerber, plaintiffs, and Anna Winkel are respectively her nephew and nieces, children of her deceased brother Henry Schneider, and that she left no other heirs; that William Brink and his wife were members of the Catholic Church and died in that faith; that at the time of William Brink's death he was seized and possessed of other real estate than that described in the petition and that said other real estate was conveyed by his widow to one Ben Smith."

The plaintiffs claim title by descent as the heirs at law of Anna Maria Brink. The defendants claim title by purchase from the Managers of the Roman Catholic Orphan Asylums of St. Louis, as the owner of the property of the St. Joseph Catholic Orphan Asylum of St. Louis.

I. It is contended that the will of William Brink was improperly admitted in evidence on the alleged ground it had not been shown that it was admitted to probate. This objection appears for the first time in appellants' brief. The only objections made to the will at the trial were (1) that it did not bequeath any property to the Managers of the Roman Catholic Orphan Asylums of St. Louis, and (2) that it shows on its face that it is a bequest in fee simple. No objection having been made and preserved as now contended, it cannot be effectively interposed at this time.

II. Appellants contend that by the terms of the will the fee passed to Anna Maria Brink and hence the lands remaining undisposed of descended at her death to her heirs.

A question determinative of this case, so far as the terms of the will are concerned, is: what was the inten-

Schneider v. Kloepple.

tion of the testator? said by Chief Justice MARSHALL (Smith v. Bell, 6 Pet. 68, 8 L. Ed. 322), "to

Intention of Testator: be the pole star in ascertaining the construction of wills." This maxim has been emphasized by our statute (Sec. 583, R. S. 1909),
Nature of Devise.

which provides that "all courts and others concerned in the execution of last wills shall have due regard to the directions of the will, and the true intent and meaning of the testator, in all matters brought before them." The testator had no children or other heirs. He and his wife had lived together many years. They were devout Catholics. The terms of his will indicate that the disposition of his property was prompted by marital affection and benevolence. It was not only natural but reasonable, measuring his conduct by that of other right-minded men under like circumstances, after having lived harmoniously and with mutual helpfulness with his wife for a long term of years, he should desire that after his death she should use the property as she pleased during her life and at her death what remained undisposed of should be devoted to the assistance of a charitable institution conducted under the auspices of the church in the faith of which he had lived and comforted by the promises of which he had died. The words of this devise are plain and direct. If reasons be required to define the testator's purpose, these we have given are ample.

This having been the testator's intention, what estate is created by the terms employed? Supplementary to the recognized rules of construction we are aided by the statute (Sec. 579, R. S. 1909), which provides in effect that although the words "heirs and assigns" are not used, the devise of lands and other estates will, in the absence of words of limitation, convey the fee or absolute title; but if the language employed shows that a lesser estate was intended, then the latter will be held to have been created.

The words employed by the testator here do not create an absolute estate such as is contemplated by the statute. On the contrary, there is an express limitation

Schneider v. Kloepple.

indicative of a purpose to create a remainder. After providing that the wife is to have the real estate "to use as she pleases" there follows the proviso that at her death what remains is to go to the orphan asylum named. This language is more direct in declaring the limitation upon the estate created than that found in *Gibson v. Gibson*, 239 Mo. 490, in which we held, after an exhaustive review of the cases on this subject, that the widow took a life estate by clear implication with power of disposal. As in that case, it must not be understood from our ruling that the estate created is limited or cut down. The words of limitation here are as clear and unambiguous as the words of creation; and the one not only co-exists but is a part of the other. In other words, there is created a life estate with power of disposal, remainder to vest as designated. There is nothing in *Middleton v. Dudding*, 183 S. W. 443, contravening the conclusion here reached. There the terms of the devise were such as to create an absolute estate; here they are not.

That the wife recognized and sought to effectuate her husband's purpose in the testamentary disposition of his real estate is evident from the desire expressed in her will that her husband's will should be executed according to his intention. The terms of the husband's will being, in our opinion, clear and definite, no question is left as to the nature of the estate created, and it is not necessary to determine whether the relative words used in the wife's will are dispositive or precatory. Whether one or the other is not material; they at least constitute a persuasive argument in favor of the correctness of the construction given to the husband's will.

III. It is contended that the will of William Brink did not name a residuary legatee; that there was at the time of his death and when this case was tried no legal entity named the St. Joseph Catholic Orphan Asylum of St. Louis, but there was at said time a corporation entitled "The Managers of the Roman Catholic Orphan Asylums of St. Louis."

**Indefiniteness
of Beneficiary.**

There was parol proof that for many years before William Brink made his will, and continuously since that time, there has existed in the city of St. Louis a voluntary charitable institution known as the St. Joseph Catholic Orphan Asylum. Its purpose was to provide a home for orphan boys of Catholic parentage. The churches in the diocese of St. Louis, including that in which the testator worshipped, contributed to the support of this asylum. Whether this was done directly or through the medium of the incorporated board of managers does not appear; but it was shown that the asylum was widely known among Catholics, and it is apparent from the testator's will that he knew of its existence and its character. It is true that the institution to which the devise was made was not a corporation, but a bequest of the character here under consideration will not be permitted to fail on that account.

In *Schmidt v. Hess*, 60 Mo. 591, land was devised to a church for a burial ground. The church was not incorporated. This court, in discussing the non-incorporation of the church for whose benefit the grant was made, said that while there "was no one *in esse*, at the time of making donation, capable of being the recipient of the trust, yet the use being a charitable one, a court of equity, having ascertained the intent of the grantor, will not allow the grant on that account to fail."

In *Missouri Historical Society v. Academy of Science*, 94 Mo. 459, it was held that a charitable gift would not be permitted to fail because of the non-incorporation of the society to which and for whose benefit the conveyance was made.

In *Lilly v. Tobbein*, 103 Mo. 477, the testator devised all of his real estate and personal property to his wife for her natural life and at her death one-half to go to her heirs and the other half to the Catholic Church at Lexington. The Catholic Church named was at the death of the testator an unincorporated association. The court, in discussing the character of the devise, said: "Ordinarily there must be a devisee in existence capable of taking, otherwise the devise is of no validity. But

it is well settled law that a charitable devise or bequest will be upheld and enforced if it is made to a voluntary unincorporated association."

From these cases it will be seen that the corporate character of the devisee is not a prerequisite to the validity of a devise.

While contending that the beneficiary named cannot take the residuary estate, it is also contended that the testator erroneously designated the devisee, intending the devise to be to the incorporated association, "The Managers of the Roman Catholic Orphan Asylums of St. Louis," and hence no estate was created. If it be admitted that the devisee was erroneously named, this will not avoid the devise. Under the circumstances here in evidence this general rule is applicable; where a beneficiary is designated by an erroneous name the bequest will not be avoided if it is possible by means of the name, or by extrinsic evidence, to identify the beneficiary intended.

To illustrate: In *Moore v. Moore*, 25 Atl. (N. J.) 403, the testator, in making bequests to several religious corporations, did not designate them under their correct corporate names. Extrinsic evidence was admitted to show the corporations meant, the court holding that this was sufficient to identify the legatees with entire certainty, and therefore the gifts were upheld.

In *Bristol v. Ontario Orphan Asylum*, 22 Atl. (Conn.) 848, the testator gave a legacy to the Canandaigua Orphan Asylum. There was no asylum of that name, but there was at Canandaigua an asylum named the Ontario Orphan Asylum. Evidence was admitted to show that the testator intended the bequest for the Ontario Asylum and the legacy was upheld.

In *Minot v. Boston Asylum*, 7 Metc. (Mass.) 416, there was a gift to the Boys Asylum and Farm School. There was no association of that name except under the name of the Boston Asylum and Farm School for Indigent Boys. It was held that this association took the legacy.

Schneider v. Kloepple.

In *Smith v. First Presbyterian Church*, 26 N. J. Eq. 132, there was a gift to Blair's Academy of Blairstown. There was no institution of this name, but there was one under the corporate name of Blair's Presbyterian Academy. It was held that it took the legacy.

In *Van Nostrand v. Board of Domestic Missions*, 59 N. J. Eq. 19, a bequest was made to the Domestic Missionary Society. This was claimed by the Board of Domestic Missions of the Reformed Church. Parol evidence was admitted to show that this was the institution meant by the testator, and it was held to be the legatee.

In *Cook v. Universalist General Convention*, 101 N. W. (Mich.) 217, a testatrix bequeathed a portion of her estate to the Universalist Japan Mission Fund. It appeared that the Universalist General Convention was the only organized society of the denomination having a mission in Japan. Proof was made of this fact and that the testatrix had contributed funds to that end and the Universalist Convention was held entitled to the fund.

In *Mason v. Massachusetts General Hospital*, 93 N. E. (Mass.) 637, it is said generally that in determining a testator's intention in designating a beneficiary the circumstances at the time of the execution of the will may be considered, and where, in the light of same, it is plain what institution was intended, that institution must be taken to be the proper beneficiary.

In *Peckham v. Newton*, 4 Atl. (R. I.) 758, a testator directed, after the expiration of a life estate provided for in the will, that the remainder of his estate be given to the Home of the Aged in Newport. There was no association of that name, but there was a corporation called the Association for the Aid of the Aged. It was held that it was entitled to the bequest.

Without further burdening the opinion with excerpts from other cases, it will suffice to say that *Reilly v. Union Protestant Infirmary of the City of Baltimore*, 40 Atl. (Md.) 894; *Ross v. Kiger*, 26 S. E. (W. Va.) 193, and *McDonald v. Shaw*, 98 S. W. (Ark.) 952, announce a like doctrine.

In the case at bar evidence was introduced showing that upon the incorporation of "The Managers of the Roman Catholic Orphan Asylums of St. Louis" the property theretofore owned by the St. Joseph Catholic Orphan Asylum and other unincorporated orphan asylums in St. Louis was turned over to the archbishop of the diocese as president of said Managers of the Roman Catholic Orphan Asylums of St. Louis to be held for the benefit of said orphan asylums, and that the property subsequently acquired was so held and used.

From all of which the conclusion is authorized that despite the fact a mistake may have been made by the testator in naming the beneficiary, the proof is sufficient to show that the corporation is entitled to take the devise. Especially is this true where it is shown that the corporation is but a legal medium through which the property devised is applied to the benefit of the association named. The judgment of the trial court is therefore affirmed and it is so ordered. All concur.

4

BEULAH WILSON et al. v. J. A. REED, Appellant.

Division Two, March 16, 1917.

1. **APPEAL: No Motion or Bill.** If the abstract of the record proper fails to show that a motion for a new trial and a bill of exceptions were filed in the trial court, only such assigned errors as may appear in the record proper can be reviewed on appeal—although the abstract contains what purports to be a bill of exceptions in which the filing of the motion and bill is recited.
2. **JUDGMENT: Responsive to Petition: Ejectment.** If a judgment is in all respects complete as a judgment in ejectment, it will not be held to be a decree in equity, and therefore irresponsible to the petition in ejectment, for that, in addition to those necessary recitals, it also recites that plaintiff is entitled to possession "for the purpose of applying the rents and profits on the debt and note" and further orders plaintiff "when said debt has been fully extinguished to turn over said premises" to defendant. These unnecessary recitals are mere surplusage.

Wilson v. Reed.

3. **DEED OF TRUST: After Condition Broken: Ejectment.** The mortgagee, after condition broken, may recover possession of the mortgaged premises by an action in ejectment, and retain such possession for the purpose of applying the rents and profits upon the principal and interest of the debt; and this applies to a trustee in a deed of trust, in whom, upon condition broken, the legal title is vested.
4. ———: ———: **Interest Alone Due: Foreclosure.** Where a note stipulates that it is to bear interest from date and if the interest be not paid annually to become as principal and bear the same rate of interest, the interest cannot be collected by suit until the maturity of the note; nor can a deed of trust securing such a note be foreclosed for condition broken where it is conditioned only upon the payment of the note according to its tenor. But a deed of trust conditioned for the payment of interest annually may be foreclosed for a breach of that condition, although the note itself has not matured.
5. ———: ———: ———: ———: **One Contract: Independent Conditions.** A note and deed of trust given to secure its payment, both executed at the same time, are one contract and must be construed together, so that effect may be given to all the terms of both instruments where possible to do so; and so a deed of trust may be foreclosed before the maturity of the note which it secures if it has provisions or conditions upon which a forfeiture will take place independently of the terms of the note.

Appeal from Polk Circuit Court.—*Hon. C. H. Skinker*,
Judge.

AFFIRMED.

Johnson & Sea for appellant.

(1) The note being conditioned that if the interest be not paid annually to become as principal and bear the same rate of interest until paid, thus leaving it optional with the maker whether it should be paid or be compounded by the terms of the note, no forfeiture could be taken until note was fully matured, and the trustee had no right to recover possession until such forfeiture. *Koehring v. Muemminghoff*, 61 Mo. 403; *Frye v. Shepherd*, 173 Mo. App. 200. (2) The terms of the note are not controlled by the conditions in the deed of trust, the deed of trust being a mere incident following

the debt wherever it goes. *Owings v. McKinzie*, 133 Mo. 336; *Bank v. Com. Co.*, 93 Mo. App. 136. (3) A trustee, in a deed of trust, has no right to the possession of the premises, and having no right to possession, cannot maintain an action in ejectment. *Siemers v. Schrader*, 88 Mo. 20; *Bailey v. Winn*, 101 Mo. 656.

Rechow & Pufahl for respondent.

(1) Where the deed of trust provided that the interest should be paid annually, and if not paid it was to be compounded, and that if the maker should refuse to pay the debt, or the interest, or any part thereof, when due, then the whole should become due and payable, the agreement for compounding interest is no waiver of the right to enforce its payment when due, and the trustee might properly sell, if the interest is not paid annually. *Waples v. Jones*, 62 Mo. 440. Where a guardian and curator loans the money of his wards, the interest is payable whether so expressed in the note or not. *R. S. 1909, sec. 444*; *Payne v. King*, 38 Mo. 502. The defendant was bound to know that this was the law and must be governed thereby; and the fact that he did not insert that clause in the note cannot benefit him. He, certainly of all men, is not in a position to take advantage of his own wrong or neglect. *Sturgeon v. Hampton*, 88 Mo. 213; *Montgomery County v. Auchley*, 103 Mo. 507. Where the deed of trust provides that the debtor shall pay the taxes on the property, or shall keep the property insured, or shall make certain repairs and in case of default in that regard the debt, principal and interest shall mature and the property be sold to pay the same, a sale for non-compliance with any of these conditions could be made. *Phillips v. Bailey*, 82 Mo. 639. (2) After condition broken a mortgagee in a mortgage is entitled to possession and may maintain ejectment for the purpose of paying the debt. The legal title in a deed of trust is in the trustee, and after condition broken, he may maintain ejectment. *Johnson v. Houston*, 47 Mo. 227; *Siemers v. Schrader*,

88 Mo. 23; Bailey v. Winn, 101 Mo. 656; Sutton v. Mason, 38 Mo. 120.

WHITE, C.—The appeal is from a judgment in favor of the plaintiffs in an ejectment suit.

The abstract of the record proper filed in this court fails to show that a motion for new trial was filed or was overruled, and fails to show that a bill of exceptions was filed. Appellant prints what purports to be a bill of exceptions in which the filing of the motion and the bill of exceptions and the ruling on the motion are recited, but that is insufficient to permit a review of alleged errors except such as may appear in the record proper. [Case v. Carland, 264 Mo. 463; Hogan v. Hinchey, 195 Mo. l. c. 533.]

It is claimed, however, by the appellant that sufficient errors appear on the face of the judgment to warrant a reversal. Two objections to the judgment are urged. First, that it is not responsive to the pleadings; and, second, that it is contradicted and vitiated by the recitals in the judgment itself.

The suit was filed March 10, 1912. The judgment recites that the plaintiffs Beulah A. Wilson, Charles R. Wilson, Jessie G. Wilson and Mildred E. Wilson are all minors, and that the plaintiff D. W. Covington is the duly appointed, qualified and acting guardian and curator of their persons and estate. That the defendant, J. A. Reed, on August 24, 1910, executed and delivered to the then guardian of these minors his promissory note for nine hundred dollars, due five years after date, *"with interest from date at the rate of six per cent per annum and if the interest be not paid annually to become as principal and bear the same rate of interest until paid."* That to secure the payment of said note the said J. A. Reed at the time executed a deed of trust conveying the land sued for to F. W. Adams as trustee; that no part of said note or interest has been paid and by the terms of said deed of trust said interest should be paid annually. The judgment then proceeds as follows:

"The court further finds that there has been a forfeiture, and that the conditions of the said deed of trust have been broken, and that the plaintiff, F. W. Adams, as trustee, is entitled to the possession of said premises hereinbefore described, for the purpose of applying the proceeds and the rents and profits therefrom on the debt and note held by the said D. W. Covington, as guardian and curator of the said Beulah A. Wilson, Charles R. Wilson, Jessie G. Wilson and Mildred E. Wilson, minors.

"The court further finds that possession was demanded from the defendant, and that he has been unlawfully holding possession of said premises since the 28th day of February, 1913, and that the damages sustained by reason of his withholding such possession amounts to thirty dollars.

"The court further finds that the value of the monthly rents and profits from said premises is eight dollars per month.

"It is therefore ordered, adjudged and decreed by the court that the said F. W. Adams, trustee, have and recover of and from the defendant, J. A. Reed, the possession of the premises herein described for the purpose of applying the proceeds, rents and profits on the debt and note executed by the defendant, J. A. Reed; and that when said debt has been fully extinguished, then he turn over possession of said premises to the said J. A. Reed."

It was further ordered that the said plaintiff have and recover of and from the said defendant, J. A. Reed, thirty dollars damages and the sum of eight dollars per month until possession should be delivered to the said plaintiff, and all costs, for all of which execution and writ of restitution might issue.

The first objection is directed at the paragraph finding the plaintiff Adams entitled to possession "*for the purpose of applying the rents and profits therefrom on the debt and note,*" etc., and ordering that plaintiff have and recover possession for such purposes, "*and that when said debt has been fully ex-*

tinguished, he turn over possession of said premises to said J. A. Reed."

Appellant claims it is a decree in equity and therefore not responsive to the petition in ejectment, a straight action at law. The judgment, without that finding, is full and complete as a judgment in ejectment; it recites the issues found for plaintiff, the amount of damages, rents and profits, and awards possession to the plaintiff and judgment for the amount of such damages, rents and profits. The recitals, which attempt to state the reason and the purpose for which possession is awarded and the conditions on which it will terminate, are mere surplusage and do not in any way invalidate or impair the force of the judgment. The judgment, therefore, is not open to the objection that it is not responsive to the pleadings.

A mortgagee, after conditions broken, may recover possession of the mortgaged premises in an action of ejectment, and retain such possession for the purpose of

**Deed of
Trust:
Ejectment
After
Condition
Broken.**

applying the rents and profits upon the interest and principal of the mortgage, and this applies to the trustee in a deed of trust in whom, upon condition broken, the legal title is vested. [Johnson v. Houston, 47 Mo. 227; Bassett v. O'Brien, 149 Mo. 381, l. c. 390;

Schanewerk v. Hoberecht, 117 Mo. l. c. 31; Siemers v. Schrader, 88 Mo. l. c. 23; Bailey v. Winn, 101 Mo. l. c. 656.] No complaint is made by the appellant of any defect or misjoinder of parties plaintiff, nor is any objection presented to the form of the petition nor to any want of harmony with the judgment, so far as the parties are concerned.

The second point is that the findings contradict the judgment in this: the court finds that the note secured by the deed of trust was to be due long after the suit was filed, that it does not provide for the *annual payment* of interest, but only provides that if it is not paid annually it will become as principal and bear the same rate of interest, and therefore the condition of

the mortgage was not broken and there could be neither foreclosure nor possession taken.

The findings of the court are in the nature of a special verdict and the judgment must be in accord with them. [Patterson v. Patterson, 200 Mo. 1. c. 344; Blount v. Spratt, 113 Mo. 1. c. 54-5; Lecompte v. Wash, 9 Mo. 551.]

It has been held that where a note contains a stipulation like the one here regarding the payment of interest, the interest cannot be collected by suit until the maturity of the note. [Frye v. Shepherd, 173 Mo. App. 200; Koehring v. Muemminghoff, 61 Mo. 403.] These cases are cited by appellant in support of the proposition that the action here was not maintainable for the reason that the note described was not yet due at the time suit was brought. It is true that a mortgage securing such a note cannot be foreclosed for condition broken where it is conditioned only upon the payment of the note according to its tenor. In the Frye case an injunction was sought to restrain a foreclosure; and the Koehring case was an ejectment suit, the plaintiff claiming under a foreclosure sale. In each of them the condition in the deed of trust, on breach of which it might be foreclosed, was the payment of the note secured and interest according to "the tenor and effect thereof," and in each case it was held the condition was not broken so as to authorize a foreclosure, although the interest was not paid annually, because the interest was not collectable until the note should become due.

A note and mortgage, or deed of trust, given to secure it, both executed at one time, are one contract and must be construed together so that effect may be given to all the terms of both instruments where possible to do so; and so it has been held that a mortgage or deed of trust may be foreclosed before the maturity of the note which it secures if it has provisions or conditions upon which a forfeiture will take place independent of the terms of the note. [Rumsey v. Peoples Railway Co., 154 Mo. 215, 1. c. 246; Truchon

v. Mackey, 171 Mo. App. 42, l. c. 47; Phillips v. Bailey, 82 Mo. 639.]

Those cases recognize the validity of a condition in a deed of trust, a violation of which would create a forfeiture before the maturity of the note, and even make the note due for the purpose of foreclosure, though not due for the purpose of a personal suit.

It is quite usual in mortgages and deeds of trust to provide that the mortgagor shall pay the taxes assessed against the property as such taxes mature, or shall keep the property insured, or shall prevent waste, and that upon a failure to comply with any such conditions the note may become payable for the purpose of foreclosure and the mortgagee may foreclose or enter for condition broken. In all such cases the stipulation is valid and binding under the authorities cited above although the debt secured by the mortgage is not yet due.

The judgment in this case does not recite that if the note or interest is not paid according to the "tenor and effect" of said note the trustee might foreclose, but recites "that there has been a forfeiture and that the conditions of the said deed of trust have been broken and that the plaintiff F. W. Adams as trustee is entitled to the possession of said premises."

This finding, therefore, is conclusive that there were conditions in the deed of trust which had been broken and would authorize a judgment for possession, although neither the note nor interest could be collected by personal suit.

The judgment is affirmed.

Roy, C., concurs.

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur.

LILLIE A. JONES, Appellant, v. JAMES A. KIRK
et al.

Division Two, March 16, 1917.

1. **LOST DEED: Quantum of Proof: Remote Transaction.** There is no hard-and-fast rule concerning the quantum of parol proof necessary to establish a lost deed. Accuracy and detail are expected in establishing a recent transaction, and absence of them would be ground of suspicion; but remoteness necessarily affects the character of the proof, and definiteness and accuracy of detail in such case would arouse suspicion. The rule that the proof must be "clear, cogent and convincing" does not mean that the proof of the same amount of definite detail should be required in every case, without regard to remoteness or lapse of time, but depends upon the circumstances of the case, the nature of the claim, possession, assertion of ownership, etc.
2. ———: **Long Possession: Presumption.** Where there are uncontradicted facts and circumstances from which it is inferable that in 1860 the owner of a one-ninth interest in land and her husband conveyed it to another cotenant, the purchase price was paid, and the deed executed and acknowledged, and was destroyed by fire in the burning of the grantee's house during the Civil War; that said grantee conveyed two-ninths interest in 1867 to a grantee who had acquired the other seven-ninths, and since said date said last grantee and those who claim under him have been in possession, claiming to be the owners, and have paid the taxes, and no assertion of title was made until long after both the original grantor and grantee were dead, it will be presumed that a deed was made in 1860 sufficient in form to convey said one-ninth interest.
3. ———: ———: ———: **Legal Formalities.** The presumption from all the circumstances that a deed sufficient to convey the land was executed and delivered implies that the deed was executed according to then existing formalities.

Appeal from Jasper Circuit Court.—*Hon. David E. Blair*, Judge.

AFFIRMED.

Thomas Hackney and *A. L. Thomas* for appellant.

(1) When parol proof of the existence and contents of a lost deed is offered as the only evidence there-

of, the witness must have seen and read it and be able to speak pointedly and clearly as to its tenor and contents and to state whether it conveyed a fee simple, a life estate or a term for years, and whether it in fact was executed by the supposed grantor. *Dagley v. Black*, 64 N. E. 277; *Rankin v. Crow*, 19 Ill. 626. (2) In order to pass title to real estate by parol proof of the contents of a lost instrument, the testimony must be clear, cogent and convincing. *Peters v. Worth*, 164 Mo. 431; *Ebersole v. Rankin*, 102 Mo. 488; *Shouler v. Bonander*, 80 Mich. 531; *Napton v. Leaton*, 71 Mo. 364; *Rivard v. Railroad*, 257 Mo. 164. (3) There is no evidence showing that a privy examination was had of Juliette K. Davis, neither is there a particle of testimony showing or tending to show that the certificate was endorsed on the written instrument. There is no evidence showing that Juliette K. Davis's name was anywhere in the body of the instrument as one of the grantors. The person in whom the title to land is vested must use appropriate words to convey the estate. Signing, sealing and acknowledging a deed by the wife, in which her husband purports to be the only grantor, will not convey her interest. *Bradley v. Mo. Pac. Ry. Co.*, 91 Mo. 493. Although a deed may be signed and acknowledged by a grantor, yet if his name does not appear in the body of the deed it does not convey the title. *Golden v. Tyler*, 180 Mo. 196. The requisites or essentials of a deed are: Competent proper parties; proper subject matter; a good and sufficient consideration; a written or printed form; sufficient legal words; reading if desired before the execution; and execution, signing, sealing and attestation. 13 Cyc. 526. At common law a seal is essential to the validity and operative effect of a deed of conveyance. 13 Cyc. 555; *Harris v. Sconce*, 66 Mo. App. 345. At common law the seal alone was the test of the existence of a deed. *Jerome v. Ortman*, 66 Mich. 668; *Walker v. Kiele*, 8 Mo. 301; *Andrews v. Costigan*, 30 Mo. App. 29; *Potter v. Everett*, 40 Mo. App. 152.

Spencer & Grayston for respondent.

(1) A party claiming title through a grantee in a lost and unrecorded deed will not be required, after the parties of the transaction are dead, or cannot be found, and after the lapse of several years without the grantor, or any one for or through him, claiming any interest in the property, to furnish the high degree of proof of the due execution and delivery of the lost deed that is generally required. (2) The declarations of the grantors that they had deeded the land are clearly admissible. *Wynn v. Cory*, 48 Mo. 346; *Dickerson v. v. Chrisman*, 28 Mo. 134; *McLaughlin v. McLaughlin*, 16 Mo. 250; *Johnson v. Quarles*, 46 Mo. 423; *Wells v. Burt*, 3 Tex. Civ. App. 432; *Townsend v. Downer*, 32 Vt. 183. (3) After a lapse of many years, and where there is no copy of the deed in existence, the secondary testimony cannot be as specific as in some cases, and the witnesses need only testify to the substance of the deed. *Parks v. Caudle*, 58 Tex. 216; *Perry v. Burton*, 111 Ill. 138.

WILLIAMS, J.—This is an appeal from the circuit court of Jasper County. The petition is in two counts, one in ejectment and one seeking partition. The land involved in the ejectment count is an undivided one-ninth interest in the southeast quarter of the northeast quarter of section 33, township 28, range 32, Jasper County, Missouri. The answer is a general denial, a plea of the Statute of Limitations, and a separate count seeking, by way of affirmative relief, to establish a lost deed alleged to have been executed in 1860 by Juliette K. Davis and husband (plaintiff claims under said Juliette K. Davis as heir) to Benjamin C. Webb, conveying an undivided one-ninth interest of the land in dispute. Trial was had before the court, without a jury, resulting in a judgment in favor of the defendant establishing said lost deed. Plaintiff has duly appealed.

Upon the trial the following admissions were made to-wit: Elijah C. Webb was the common source of title and died intestate in Jasper County in 1859. He left

surviving him nine heirs at law, including Juliette K. Davis and Benjamin C. Webb. It was also admitted at the trial that defendant Kirk, by proper conveyances, had acquired the title of all of the Elijah C. Webb heirs except that of said Juliette K. Davis.

On March 8, 1867, Benjamin C. Webb and wife (the alleged grantees in said lost deed and one of the nine heirs as aforesaid), executed a quit-claim deed to one John S. McBride, whereby they undertook to convey an undivided *two-ninths* interest of this land. About the same date, by other conveyances, said John S. McBride acquired the record title to the remaining *seven-ninths* interest in said land from the other seven heirs at law of the said Elijah C. Webb, deceased, and from that time on said John S. McBride and his successors in title have executed conveyances purporting to pass the entire title and interest in this land. It was further admitted that defendant Kirk and those under whom he claims have been in the actual, peaceable, open and notorious possession of the land in question since 1867, claiming to own the entire interest therein and to have paid all taxes on said land since that date.

Plaintiff introduced evidence tending to show that she is the daughter of Juliette K. Davis and that her mother died in August, 1864, and left surviving her her husband, William P. Davis, the plaintiff and two other children. The two other children died in the years 1877 and 1879 respectively. Plaintiff was married in 1874 to Thomas H. Jones who died on December 21, 1908. Plaintiff's father, William P Davis, remarried twice after the death of plaintiff's mother. There were no children born of the second marriage. There was one child born of the third marriage, William Clyde Davis, born in 1886, who is still living. Plaintiff's father died on June 3, 1906. This suit was instituted October 28, 1909.

The evidence upon the part of the defendants was substantially as follows:

Eliza J. Chinn, by deposition, testified that she was eighty-one years old and that in 1850 she married Ben

C. Webb (the alleged grantee in the lost deed), and that her said (first) husband died in the year 1888. The witness was acquainted with Juliette Catherine Davis, daughter of Elijah C. Webb, and remembered a "transaction of Mrs. Davis and her husband disposing of their interest in the Elijah C. Webb estate." "It was in '60, the spring of '60." That "Mr. Davis and his wife and a justice of the peace came to our house to sign it." The justice "lived in this county, somewhere, I suppose. I don't remember just where he lived; Wm. Davis and his wife had him come down there." That Mr. Webb wrote the deed first and Wm. Davis and his wife signed the instrument; that Ben C. Webb was buying the land. "I can't give you the numbers or describe the land to you at all, but it was the land, I don't know who owns it now, McBride's old place it used to be" . . . "No, sir, I don't know, I could not tell you the number of acres in it;" that Mr. and Mrs. Davis signed the deed that her husband had written; "the deed was burned in time of the war and they say it was never recorded. I suppose it was. They say it don't show, but our deeds were all burned in time of the war;" "Mr. Webb had the deed there the day after Mr. and Mrs. Davis signed the deed, and the justice signed the acknowledgment." That it was kept in the house until the war broke out, when it was hidden in the field under a pile of rocks "in a tin box and a wooden box over that." . . . "Some boys found them and brought them to us. I was away from home when the house burnt. They had been brought to the house, but had never been put away any more. I was sick and they moved me to my mother's; I wasn't there when the house was burned, but everything was burned the time they were through burning houses there, the time old man Hatcher and Jessie Ferry was killed." The house was burned in 1863. The witness further testified that her husband paid for this land with stock, "two yoke of work cattle, some milk cows, some young heifers and a couple of young mares;" that James Johnson, the boy who worked for Mr. Davis at that time, came and took

the stock to Mr. Davis's home the next morning; that the land that day purchased by witness's husband was included in the land that she and her husband afterwards sold to John S. McBride; that shortly after this transaction Mr. and Mrs. Davis bought land "over west of here, somewhere west of town." After this time the witness's husband claimed to own the land, and Juliette K. Davis "never claimed it after she sold it, of course."

J. M. Johnson, by deposition, testified that he was sixty-seven years old and was born and raised in Jasper County; that he was acquainted with William P. Davis and his wife; that he lived about three and one-half miles from the Webb homestead and was acquainted with Elijah C. Webb and Benjamin C. Webb; that he worked for William P. Davis in 1859 and '60; that he remembered "a transaction concerning the sale of the interest in the Elijah C. Webb estate between Webb and Davis" and "was working there when the trade was made;" that the witness and Mr. and Mrs. Davis went to Ben Webb's place one evening and stayed over night and in the morning they wrote the instrument (the witness used the word deed, but the court struck out the character of the instrument); that Mr. Webb wrote the instrument "on his own table" and "after he got it written he read it over and called me as a witness; then he handed it to Mr. Davis and he read it over." "Mr. Davis was making the deed to Mr. Webb." That "after the instrument was read over, we went out into the lot and took out the cattle and drove them home;" "Mr. and Mrs. Davis drove them down to Mr. Davis's home." On cross-examination this witness testified that there was no one else in the house to witness the deed except the witness, Benjamin C. Webb and William P. Davis, and that William P. Davis did not sign the deed that morning; the witness further stated that he was not there the next day "when him and his wife signed it up." The witness was not there when the deed was signed, but stated that he took care of the stock until

they came back, and they said that they had signed it; the witness did not read the paper the morning that he was there, stating, "I aint got much education, and they read it over to me." "Yes, they called on me to witness the deed. They took the cattle over that morning, two yoke of cattle, two cows and two yearling heifers to William P. Davis's house." This witness further testified that after Mr. Davis read the instrument, "he folded it up and left it with Mr. Webb." The further question was asked and answer made, as follows: "Q. You said something about driving this cattle to Mr. Davis's and then Mrs. Davis and her husband came over there and you had some conversation with them about the deed and about signing it." A. "I asked them if they got their business fixed up. They said they did." "They stayed all night down there to Mr. Webb's their two selves." "This was the next evening. We went like it was today, stayed all night, brought the cattle tomorrow and then the next day they went down and fixed up the papers." Both of them said, "we got our business all fixed up;" that "when Mrs. Davis, Mrs. Juliette K. Davis, went back the second evening over to Webb's with her husband, she said she was going over to fix up the papers about this land."

Further evidence introduced by defendants in support of their theory of a lost deed was, upon motion of plaintiff, stricken out, but no exceptions were saved to the court's action in striking out.

After a very careful consideration of all the testimony stated in the foregoing statement of facts we have reached the conclusion that the evidence is sufficient to sustain the decree entered by the trial court.

A review of the many authorities on the subject will disclose the absence of a hard-and-fast rule concerning the exact *quantum* of parol proof necessary to establish a lost deed. The remoteness of the alleged transaction must necessarily affect the character of the proof required. While accuracy and detail are to be expected in establishing a recent transaction and

Lost
Deed.

the absence of the same would give ground for suspicion, yet as to remote transactions (as in the instant case where the transaction occurred fifty-three years before the trial), the presence of the same definiteness and accuracy which would strengthen the case of a recent transaction would, in most instances, but tend to arouse suspicion concerning the occurrence of the remote transaction.

The rule, therefore, that the proof must be "clear, cogent and convincing," as announced in the cases cited by appellant, does not mean that proof of the same amount of definite detail should be required in every case, without regard to remoteness or lapse of time, but as stated in 4 Ency. Evidence, at page 215:

"The sufficiency of the proof necessary to establish an alleged lost deed depends largely upon the circumstances of the case and the nature of the claim which it is relied upon to support. While mere difficulty will not relax the stringency of the rule requiring definite and certain proof, yet the evidence in many cases must be of a circumstantial nature and while perhaps equally convincing, it must derive support from the lapse of time and accompanying facts and circumstances."

At page 219 (4 Ency. Evidence), it is further said: "Except in cases falling within the Statute of Limitations, a deed will not be presumed as a matter of law. But where all the circumstances *are inconsistent with any other hypothesis, the existence of a sufficient deed is often presumed as a matter of fact in support of a long-continued and undisputed possession under a claim of ownership*, even though there is no direct evidence that one was ever executed." (Italics ours).

In the early case of *Dessaunier v. Murphy*, 22 Mo. 95, l. c. 103, the court, speaking through LEONARD, J., after discussing the English rule, said:

"The American cases however, have, no doubt, gone beyond this and advised juries to presume conveyances in cases, where, from long acquiescence on the part of the original owners in the adverse enjoyment of the property by others, connected with other corroborat-

ing circumstances, it is fair to presume, in point of fact, that their possession had a legal commencement."

In the same case, l. c. 104-5, it was further stated:

"Mere possession unaccompanied by other circumstances, cannot afford a conclusive presumption of title unless continued for the length of time and under the circumstances prescribed by the Statute of Limitations (when it has that effect by mere force of the statute, as a conclusive presumption, declared by the Legislature) although when connected with other circumstances, it may justify a jury in presuming a conveyance, or the court in deducing a legal presumption of the transfer of the right, according to the character and weight of these circumstances. In the present case the material fact beside 'the long continued possession,' is the alleged sale made or completed by the guardian of the ancestor about 1782 and the payment at that time of the purchase money, evidenced by the receipt recited in the deed of 1811; and if this fact were established, it might then be proper to advise a jury to presume a conveyance of the title from any proper party, pursuant to and in confirmation of the sale, even against married women; or the court, it may be, would be warranted in deducing a legal presumption of some transaction, sufficient to pass the formal title."

In the case at bar defendant and those under whom he claims have, since the year 1867, been in the peaceable possession of this land, claiming to own the same, and since said date have paid all taxes thereon. From the uncontradicted facts and circumstances detailed in evidence, we think, it is also clearly inferable that in 1860 Benjamin C. Webb (defendant's predecessor in title) bought this land from Juliette K. Davis (the person under whom plaintiff claims), and paid the purchase price therefor, and in connection with said transaction received a written instrument signed by the then owners of said land and acknowledged by them before a justice of the peace; that said instrument was afterwards destroyed by fire and that after said sale the vendors made no further claim to said land. Applying the rule

announced in the Dessanier case, *supra*, we find no difficulty in saying that the long continued possession here shown is surrounded and accompanied by "corroborating circumstances" sufficient in character to justify the allowance of a presumption of fact that a deed was then made to said Webb sufficient in form to convey the land in controversy. The facts of this case are even stronger than the facts in the Dessanier case. In this case there is evidence of a written instrument having been executed and delivered at the time of the transaction. In the Dessanier case there was no such evidence.

The foregoing rule of presumption was, in the case of *Glasgow v. Mo. Car & Foundry Co.*, 229 Mo. 585, l. c. 600, applied to a state of facts even less cogent and convincing than those now in hand, the court speaking through GANTT, P. J., saying:

"That courts and juries may find and indulge the presumption of the due execution and delivery of deeds from a state of facts such as we have here is no longer doubted in this State."

Many Missouri cases, including the Dessanier case, *supra*, are cited in support of that doctrine.

It is contended by appellant, however, that there is no evidence that the lost deed was executed according to the then existing legal formalities. Concerning this point, we call attention to the language employed in the quotation from *Glasgow v. Mo. Car and Foundry Co.*, *supra*, wherein it is said that the "*due* execution and delivery of deeds" is to be presumed under conditions there present. (*Italics ours.*) It is quite apparent that it would be futile to presume the existence of an invalid instrument. The deed which is to be presumed is one executed in conformity "with all the formalities required by law." [4 Ency. of Evidence, page 210 (h), and cases therein cited.]

The judgment is affirmed. All concur.

ELIZABETH JOHNSON, Appellant, v. CHICAGO,
MILWAUKEE & ST. PAUL RAILWAY COM-
PANY:

Division Two, March 16, 1917.

1. **DAMAGES: Sec. 5425: Suing for Only \$2000.** The language used in Sec. 5425, R. S. 1909, namely, that defendant "shall forfeit and pay as a penalty the sum of not less than two thousand dollars, and not exceeding ten thousand dollars, in the discretion of the jury," means that the \$2000 is penalty alone, and the amount which plaintiff may recover above that sum is not penalty, but compensation for loss, which is to be established by evidence; and that being true, plaintiff may sue for \$2000 as a penalty, and for that alone, and may forego her right to compensation, if any such right she has. [Following *Boyd v. Mo. Pac. Ry. Co.*, 249 Mo. l. c. 126.]
2. ———: ———: ———: **Constitutionality.** Since the statute itself fixes the penalty plaintiff may recover at \$2000, it is not therefore to render the statute unconstitutional, to permit her to sue for \$2000 as a penalty alone and to forego any demand for compensation.

Appeal from Jackson Circuit Court.—*Hon. James E. Goodrich*, Judge.

REVERSED AND REMANDED (*with directions*).

J. Harold Olson and *T. J. Madden* for appellant.

Frank Hagerman, *E. E. Ball* and *Clyde Taylor* for respondent.

FARIS, J.—This case comes to us by transfer from the Kansas City Court of Appeals, because it was strenuously urged by respondent that the interpretation of section 5425, Revised Statutes 1909, for which appellant contended to sustain her verdict *nisi*, rendered that section unconstitutional.

Upon an examination of the whole case the Kansas City Court of Appeals felt constrained, in a learned and ably reasoned opinion by Judge TRIMBLE, in which all

of that court concurred, to put upon said section the identical construction which was banned by the anathema of respondent. Therefore, in order that this court might determine whether the construction placed on said section does render it unconstitutional, the Court of Appeals sent the case to us.

The facts in the case, the view taken of the law and the precise nature of the constitutional question urged as arising from the view taken, are all carefully set forth and discussed in the opinion of the Kansas City Court of Appeals (*Johnson v. Railroad*, 174 Mo. App. 16), in which we concur. This opinion, so far as it is pertinent, is as follows:

“Plaintiff brought this suit under section 5425, Revised Statutes 1909, to recover a penalty of \$2000 for the death of her husband caused by the alleged negligence of defendant’s servants whilst running one of its trains.

“The husband, while lying drunk upon the railroad track, was run over and killed by defendant’s train, as it was being backed out of the Union Depot in Kansas City, where it had just delivered its passengers. A pilot, who had charge of the train, and who controlled it the same as an engineer, was stationed on the rear end. In substance, the petition claimed that the track where deceased was killed was in a busy part of the city and was used as a pathway by pedestrians at all times of the day and night, which fact was known to defendant, and it was thereby the duty of defendant’s servants, and especially the duty of this pilot, to keep a vigilant lookout for persons on the track to avoid injuring them; that the pilot, after he saw deceased on the track could have avoided killing him, but negligently failed to do so. The petition closed with the following: ‘That by reason of the premises plaintiff has been damaged and defendant should be made to forfeit and pay as a penalty the sum of two thousand dollars, for which amount, with the costs of this action, she demands judgment.’

"The answer was a general denial and a plea of contributory negligence, to which a reply was filed, and the trial began. Defendant objected to the introduction of any evidence for the reason that the petition did not state a cause of action. The sole ground of this objection was, that the statute on which the suit is based provides a certain penalty, but that penalty is not declared upon nor demanded in the petition, and, therefore, plaintiff has not brought her petition and case within the terms of the statute; in other words, since the petition did not declare upon the penalty provided in the statute, it stated no cause of action. This objection was overruled, and the case proceeded to verdict and judgment in plaintiff's favor for \$2000. On motion for a new trial, however, the above point was again raised, and the trial court sustained defendant's contention in regard thereto, and granted a new trial for the reason that, the suit being on section 5425, it does not lie within the power of the plaintiff to bring suit for a sum or penalty less than that provided by the section, and, therefore, a suit for the sum of two thousand dollars is not maintainable. Plaintiff appealed from the order granting a new trial. And the sole question presented is, can a plaintiff, under the section in question, as it *now* stands, sue for less than the maximum provided by that section? Or, to state it a little more accurately, can the plaintiff under said section limit her demand to \$2000, or must she sue for whatever amount may be assessed by the jury in its discretion within the limits provided by the statutes, namely, a minimum of \$2000 and a maximum of \$10,000?

"Prior to the amendment of 1905, the amount recoverable for a death coming within the terms of this statute was placed at the fixed and immovable sum of \$5000. Plaintiff could then recover neither less nor more. The words of the statute as to the penalty were 'shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars.' Under the section as it thus stood, prior to 1905, it was held that,

as the amount specified in the statute was absolutely fixed at \$5000, no more and no less, a suit could not be maintained which sought to recover less than that sum; that under such a statute, a plaintiff must declare for and seek to recover the precise or full measure of the penalty therein provided. [Casey v. St. Louis Transit Company, 116 Mo. App. 235, l. c. 260; Same Case, 205 Mo. 721, l. c. 723.] Since those decisions were rendered, however, the statute has been amended. [Laws 1905, p. 135.] That part of the section fixing the amount recoverable now reads, 'shall forfeit and pay as a penalty, for every such person, employee or passenger so dying, the sum of not less than two thousand dollars and not exceeding ten thousand dollars, in the discretion of the jury.' The question now is, has this change in the statute rendered it permissible for the plaintiff to do in this case what she could not have done under the statute as it formerly stood? Unless this amendment has so changed the law that the reasons underlying the above named cases have ceased to exist, then said cases require with absolute certainty that the judgment of the lower court be affirmed. Have these reasons ceased to exist by virtue of the amendment? To answer this question we must first examine these reasons and then see whether or not the amendment has obviated or destroyed them.

"As the Supreme Court adopted the opinion of the St. Louis Court of Appeals in the Casey case, the reasons underlying both of the above named decisions are to be found in an examination of that opinion.

"The fundamental reason appearing therein why the plaintiff could not sue for less than the *fixed and precise* sum named by the statute was that the statute gave said sum as a penalty; and as the statute was thus penal, it must be strictly construed, and 'the suing party must bring himself strictly within its provisions and, among other things, *demand and recover the precise amount of the penal sum therein provided.*' [Casey v. Transit Co., 116 Mo. App. l. c. 252.]

“Now, it must be borne in mind that, as the statute then stood, this penal feature *inhered in and existed throughout the whole of the \$5000 allowed*. It necessarily must have done so since the amount was fixed at that precise sum, no more and no less, and if penal at all was penal throughout. It is true the statute was held to be both remedial and penal, but its remediality, if any, and *its penalty existed in and pervaded the whole sum named*, thus making the whole sum a penalty. In other words, as the amount named by the statute was one fixed and certain sum there was no room for saying that a part of it would be considered penal and the remainder remedial. Both the penal and remedial features inhered in the amount throughout. Consequently whatever sum a plaintiff might seek to recover would have in it this penal feature. And if a plaintiff would seek to recover a penalty provided by the statute, he must ask for that penalty and no other. As said in *Casey v. Transit Co.*, 116 Mo. App. 252, l. c. 254, speaking of the rule of strict construction, as applied to the penal and not the remedial feature of the statute, ‘it is manifest from the use of the word “forfeiture” by the Legislature, together with the consideration that no evidence is to be heard and no day in court to be had on the amount of plaintiffs’ damages and the measure of their recovery, that the amount named in the statute should be a penalty inflicted as a punishment upon the person guilty of the wrongs therein sought to be prevented. Applying then the rule of strict construction to the penal feature of the statute, the conclusion is that the penal sum therein fixed at \$5000 means \$5000. It does not mean \$4500 no (any) more than it means \$450 or forty-five dollars. Indeed it seems that the Legislature intended that the perpetrator of the mischief sought to be prevented should pay the full penalty levied and did not intend that the private citizen might fritter away that penalty provided by virtue of the police power of the State for the purpose of preventing wrongs, so that conditions might arise where one offender would pay \$5000 and another

be permitted to pay \$4500 and another a much less sum as might suit the convenience of the party putting the statute into operation by his suit.' All of which means that *as the whole of the \$5000 is penal*, that is, the penalty inheres in all of it, as shown by the language of the statute and the fact that *no evidence is admissible on either side as to the amount of damages*, then a plaintiff must seek to recover the penalty provided, and will not be allowed to *whittle down* the State's penalties to suit his or her convenience, thereby making different penalties in different suits for the same character of acts.

"But in the statute, as now amended, *does the penal feature inhere throughout the entire sum* from the minimum limit of \$2000 to the maximum limit of \$10,000? In answer to this question whether or not the entire amount from one limit to the other is penalty, or has in it the elements of penalty, it would seem that, if the language of the statute is accepted as it reads, then the element of penalty extends throughout the whole of the amount specified by those limits. It says, 'shall forfeit and pay as a *penalty* the sum of not less than two thousand dollars, and not exceeding ten thousand dollars, in the discretion of the jury.' The word 'forfeit' implies a penalty and the words 'as a penalty' expressly say it is such. So that on the mere face of the statute it would seem that the entire amount allowable was intended as a penalty. And in *Young v. Railroad*, 227 Mo. 307, the Supreme Court held that the whole amount allowed by the statute between the two limits was *penal* in character; and in *Boyd v. Railroad*, 236 Mo. 54, the holding is that it is both penal and remedial or compensatory, that is, that the penal feature exists along with the compensatory feature throughout the range fixed by the statute between the two limits. But in *Boyd v. Railroad*, decided March 28, 1913, and reported in 249 Mo. 110, 155 S. W. 13, l. c. 17, the Supreme Court expressly overrules the *Young* case in so far as it holds that the statute is penal throughout, and also expressly overrules the former decision in

the Boyd case in the 236 Mo. 54, in so far as it holds that there is anything penal existing in the range permitted above \$2000. And, in lieu of the doctrine announced by either the Young or the first Boyd case on this point, the Supreme Court announced the rule that said section, as it now stands, *is penal so far as it fixes the amount of recovery at not less than \$2000*, but is remedial and compensatory *as to any recovery in excess of that amount*. Of course this decision, in holding that the statute, by fixing the minimum at \$2000, is *purely* penal, does not say, in express terms, that the *excess is purely* compensatory; in other words it does not expressly say that the penal feature does not extend above the \$2000 and inhere therein throughout the range given along with the compensatory feature. But evidently that is the holding, else why expressly overrule the Boyd decision in 236 Mo. 54, which held that the whole range was both penal and compensatory?

"It is also apparent that, in this last Boyd case, there is a distinction between a case in which only the penalty is demanded and one in which both penalty and compensation are sought. On page 16 of the 155 S. W. Reporter, the court say:

"'Upon a full consideration of this case In Banc, we are convinced that it was the intention of the General Assembly by the amendment of 1905 to leave the provisions of section 5425, *supra*, penal in their nature, so far as said section fixes the amount of recovery at not less than \$2000, but where a plaintiff, as in this case, seeks to recover under said section a larger sum than \$2000; the jury or court in preparing itself to exercise a wise and just discretion should receive evidence of the age, condition of health, and earning capacity of the party killed, and the consequent loss to the plaintiff thereby, together with the facts and circumstances attending the killing, for which damages are sought to be recovered. In other words, a recovery under section 5425, Revised Statutes 1909, is penal up to the sum of \$2000, but the extent to which a plaintiff may recover, if at all, in excess of \$2000, under that

section, is remedial and compensatory.' That is to say, if a plaintiff sues for penalty *only*, no evidence as to age, health and capacity of the deceased is admissible, since it would not help in any way, as the penalty must be applied regardless of these considerations, if the jury believe the deceased's death was within the terms of the statute; but, if the plaintiff 'seeks to recover a *larger* sum than \$2000' such evidence is admissible and should be given. Evidently, therefore, there is a distinction between a suit for the *bare* penalty and one for the penalty with compensation. Because if every plaintiff suing under the statute must demand the maximum amount in the petition, what is the necessity of saying that the statute is penal as to the \$2000? But where a plaintiff 'seeks to recover a *larger* sum than \$2000,' evidence as to the *loss* plaintiff has sustained must be given. If all petitions must demand the full amount there was no necessity for using such language, but the court could merely have said that in all such suits evidence showing plaintiff's *damage* was admissible. It would seem, therefore, that the last Boyd case holds that the statute is penal only as to the \$2000 and compensatory as to any thing in excess of that sum. If so, then the State has given to plaintiffs in such cases, not merely *one* right, but one of *two* rights, namely, the right to sue either for the penalty *alone* or for both penalty *and* compensation. And if this is true, who is to say to plaintiff, 'You cannot sue merely for the penalty, but must sue for both penalty and compensation?' Grant it that a plaintiff is not allowed to vary or change the penalty prescribed by the State for the commission of a certain act; to sue for the \$2000, under the statute, as it now stands, is not to *vary* the penalty; it is to demand the precise sum fixed as penalty. The only thing plaintiff has varied, or rather given up, is her right to demand compensation. It is not certain that she has given up any compensation since the question whether she is entitled thereto or not depends on whether she has suffered damage. But whether she has given up her right to be com-

pensated or not, is not a matter of State concern. The matter of compensation is hers to give up or sue for as she chooses. She may give it up, either by not asking for compensation in her petition, or, if she has demanded it therein, by not offering any evidence showing that she is entitled to compensation. As the penalty is the lowest amount provided, it is no injustice to the defendant to permit plaintiff to forego the element of compensation *either* in her *petition* or in her *evidence*. If she is to be compelled to ask for it in the one, why should she not be refused entirely if she does not seek it in the other? It does not lie in defendant's mouth to complain because it is not called upon to pay a larger sum.

"It is argued that if the statute is thus construed so as to permit a plaintiff to sue for less than the maximum, then we are placing on it a construction which will render it unconstitutional. With its constitutionality, of course, we have nothing to do. However, this claim that such a construction will render the statute unconstitutional is based on the view that the statute is penal, not only as to the \$2000, but also as to *everything in excess* of \$2000, and that to allow a plaintiff to sue for any amount less than \$10,000, is unconstitutional in that it is permitting *her* to fix the penalty; that, in such case, the penalty is fixed, not by the legislative power, but by the plaintiff in each particular case. [Citing Cigar Makers' International Union v. Goldberg, 61 Atl. 457.] Since the Supreme Court in the last Boyd case, *supra*, has said that the statute is penal as to the \$2000, but is compensatory as to the excess, there is no basis upon which to rest the claim that such construction would make the statute unconstitutional. But whether it is or is not thus rendered unconstitutional is a question for the Supreme Court to pass upon whenever its constitutionality is attacked. If the \$2000 is all penalty, and all over that is merely compensation, then the legislative power has fixed the penalty at \$2000, and plaintiff, by suing for \$2000, is not fixing the penalty, but is demanding what has al-

ready been fixed by the Legislature. The view that the statute is penal throughout the whole range between the two limits fixed therein, as announced in the Young case, *supra*, and the view that it is both penal and compensatory as to anything in excess of \$2000 announced in the first Boyd case, has been repudiated by the Supreme Court in the last Boyd case, since, in it, the two above named cases are expressly overruled.

"It is urged that the penalty is to be fixed 'in the discretion of the jury,' and that to allow plaintiff to sue for \$2000 is to take away that discretion. This again assumes that the excess over \$2000 is penal in its nature. But if it is not and only the \$2000 is penal, then as to the *penalty* the jury has no discretion. If it believes that plaintiff was killed within the terms of the statute then the penalty is fixed, and its discretion operates *only upon the compensatory part of the recovery*. Even though a plaintiff bring a suit asking for the maximum amount, yet if no evidence is offered upon which the jury can exercise its discretion as to compensation, the amount allowed cannot exceed \$2000, because, in that event, there is nothing upon which a verdict for a greater amount can be based. 'The discretion of the jury' has nothing upon which to operate. But as to the \$2000, if the killing was within the terms of the statute, *there is no discretion*; the penalty must be given. If, now, a plaintiff, by a mere failure to offer evidence on the compensatory feature, can take from the jury the discretion to award a larger amount than \$2000, what is there to prevent such plaintiff from drawing her petition and bringing her suit in such way as to limit her recovery to the penalty purely and thereby limit the jury to the precise sum of \$2000? In either case the jury is limited as to the amount of its verdict. And in both, if the jury believes the testimony tending to show that the death occurred under such circumstances as the statute requires, *there is no discretion to be exercised*, but the jury must impose the pure penalty fixed by the statute, namely, \$2000. So that after all, the question comes down again to whether the last Boyd

case means that, as to the \$2000, the statute is penal, but *not as to any amount in excess of that sum*. From the language used, as well as from the fact that it expressly overrules both the Young and the former Boyd cases (both of which held that it was penal as to such excess), we accept it as holding that it is penal only as to the \$2000 and not as to any amount above that sum. If that is the correct view, then plaintiff has a right to sue for the penalty only, and to forego her right to compensation, if she was entitled to any compensation.

"It is urged that plaintiff brought this suit for \$2000 only in order to keep out of the Federal courts. But if, under the statute, only the \$2000 is penalty, then she has a right to sue for that alone. And if she has a right to sue for it alone, her reasons for not also suing for compensation cannot be inquired into, nor impugned. So far as that is concerned, as the penalty sued for is the *lowest* amount recoverable under the statute, she could in turn charge defendant with insisting that it be sued for the larger amount *solely* in order that the case could be taken to the Federal court. In either case, it is not a question of the motives of litigants, but of their rights under the law. The same is to be said in response to the objection that such a construction will enable a plaintiff to work a fraud upon the jurisdiction of the courts. There can be fraud worked upon the jurisdiction of the courts by bringing a suit solely for the penalty, if there is a clear line of demarcation between the penal and compensatory features of the statute. As the holding of the last decision in the Boyd case by the Supreme Court is that the statute in question is penal only as to the \$2000 and compensatory as to anything in excess of that amount, the logical result of such holding is that plaintiff can sue for the penalty prescribed without asking for compensation."

Regarding the phase of unconstitutionality urged in the event it should be held that plaintiff could sue for the sum of \$2000 only, if she so elected, it is enough to say that it is plain that whatever merit there might

have been in this contention has been wholly destroyed by the opinion of this court In Banc in the case of *Boyd v. Missouri Pacific Ry. Co.*, 249 Mo. 1. c. 126, which latter case came down while the appeal in the instant case was pending. After a careful re-examination of the *Boyd* case, upon the question of the nature of the elements of recovery, we are again constrained to say that it seems to put upon said section 5425—the history and language of which when measured by the settled canons of construction render its meaning debatable—the most logical and reasonable construction possible.

It follows that this case should be reversed and remanded with directions to the circuit court to reinstate the verdict of the jury and enter judgment thereon for the plaintiff. Let this be done. All concur.

THE STATE ex rel. UNITED RAILWAYS COMPANY, Appellant, v. PUBLIC SERVICE COMMISSION.

In Banc, March 24, 1917.

1. **PUBLIC SERVICE COMMISSION: Powers: Limited by Constitution.** Despite the fact the statutes of other States creating public service commissions and defining their powers may be similar to and are often identical with our own, in construing the Missouri act little aid is afforded by the decisions of such States, since their organic laws are different from ours, and our legislative acts are restricted by plain constitutional provisions.
2. ———: ———: **To Direct Construction of Street Railway.** The Public Service Commission has no power to order an existing private corporation to apply to a municipal authority for a franchise to construct and operate a street railway in the public streets of a city.
3. ———: ———: ———: **Consent of City.** Since the Constitution (Art. 12, sec. 20) prohibits the General Assembly from enacting a law granting the right to construct and operate a street railroad in any city "without first acquiring the consent of the local author-

ities having control of the street or highway proposed to be occupied by said street railroad," the Public Service Commission has no power, although a statute attempts to authorize it to do so, to order a private company, operating a street railway on certain streets of a city, to apply to the municipal authorities for a franchise to construct and operate a street railway on other streets.

4. ———: ———: ———: ———: **Source of Power.** The source of the power to consent to the construction of a railway on a public street is the local authorities; the language of the constitutional provision (Art. 12, sec. 20) is not directed solely to corporations seeking the privilege to construct and operate a street railroad; a condition precedent to the validity of a statute authorizing such use of a public street is that the consent of the local authorities be first obtained.
5. ———: ———: ———: ———: **Exceptions to Constitutional Inhibition.** Modifications in the application of a constitutional provision are permissible only in the presence of clearly defined exceptions, and where such are neither expressed nor implied neither courts nor the General Assembly have any authority to make them.
6. ———: ———: ———: ———: **Legislative Modification.** In a conflict between the Constitution and a statute the latter must yield. Subsequent legislation cannot modify the Constitution.
7. ———: ———: **Consent: Compulsion: By Indirection.** Consent such as the law recognizes cannot be the subject of compulsion. Its existence depends on the exercise of the voluntary will of those from whom it is obtained. The Public Service Commission cannot by an order directing a private corporation to extend its railway tracks upon unoccupied public streets and to obtain within thirty days the permission of municipal authorities to do so, compel, in this indirect way, said authorities to consent to such extension.
8. ———: ———: **Statute Restricted to Constitutional Limitations.** It will not be presumed that the Legislature intended to enact an invalid law. The extensive powers given by section 49 of the Public Service Act, Laws 1913, p. 588, to the Commission to order a street railway to construct additional tracks and make such changes, improvements and additions as may promote the security and convenience of the public or secure adequate service or facilities for the transportation of passengers, are to be construed as subservient to and in harmony with the constitutional provision forbidding such extensions until the municipal authorities consent to such construction, and not as authorizing the Commission to order the railway company to take the initiative in procuring the required consent.
9. ———: ———: **Scope of Statute: Incidental Facilities.** The Public Service Commission has power to order the construction of such sidetracks, switches, cross-overs and terminals as are incidental to

State ex rel. v. Public Service Comm.

the operation of the main lines of an existing railway corporation; but the Legislature has no constitutional authority, and hence the Commission is not empowered, to compel such corporation, in the absence of authority in its charter, to enter new territory by the extension of its lines of railway upon other public streets.

10. ———: ———: **St. Louis Charter: Statute Paramount.** Under the provision of the Constitution authorizing the city of St. Louis to frame and adopt a charter for its own government, the city did not acquire the right to assume all powers the State may exercise within the city limits, but only those incident to it as a municipality or which concern matters of purely local government.
11. ———: ———: ———: **Control of Public Utilities.** The provisions of the present St. Louis charter which attempt to vest in the Board of Aldermen full power to regulate the construction, operation, charges and facilities of a public utility, not being a matter of purely local or municipal concern, must yield to the paramount authority of the statute investing such regulation in the Public Service Commission.
12. ———: ———: **Abandonment of Franchise by Non-User.** The right or franchise granted to a company to build a railway on a named street, unused for twenty-four years, is to be considered as abandoned by the company; and the Public Service Commission is not authorized by reason of the original grant to direct the company in regard to its exercise. [On Motion to Modify Opinion.]
13. ———: ———: ———: **Judicial Forfeiture.** The consent of the city to the occupancy of its streets by a railway company is not technically a contract, but a privilege or license, and being such and being unused for such a length of time as to constitute an abandonment, a judicial proceeding to effect its forfeiture is not necessary. [On Motion to Modify Opinion.]

Appeal from St. Louis City Circuit Court.—*Hon. George H. Shields*, Judge.

REVERSED AND REMANDED (*with directions*).

Boyle & Priest and William E. Baird for appellant.

(1) The Constitution provides that the privilege of operating a street railroad shall be acquired by securing the consent of the local authorities and this is the only manner in which such privilege can lawfully be acquired. Mo. Constitution, art. 12, sec. 20; *Grand Ave. Railroad v. Lindell Railroad*, 148 Mo. 637; *State ex rel. v. Lindell Railroad*, 151 Mo. 162. (2) While this consent may impose upon the grantee duties which are es-

sententially public, it creates a relation which in many respects is wholly contractual between the street railroad and the city as a corporation. *Springfield Railroad v. Springfield*, 85 Mo. 674; *State ex rel. v. Railroad*, 85 Mo. 282; *Railroad v. Kirkwood*, 159 Mo. 252; *Cleveland v. Electric Co.*, 201 U. S. 529. (3) In the city of St. Louis this consent can be given only by ordinance and an acceptance by the street railroad; this is purely a legislative act, the city acting as the delegated agent of the State. City Charter, art. 1, sec. 1, clause 12; *Railroad v. Railroad*, 148 Mo. 645; *State ex inf. v. Railroad*, 151 Mo. 183; *Township v. Railroad*, 130 Mich. 363; *People ex rel. v. Railroad*, 178 Ill. 594; *State v. Railroad*, 51 Kan. 609; *Railroad v. Brown*, 97 Va. 26; *City v. Railroad*, 95 Mich. 456. (4) The power of the commission is limited to the regulation of the service afforded and which may be afforded under existing franchises; it has no power to grant the privilege to operate or to compel a street railroad to make a contract with the city. Pub. Ser. Comm. Law, sec. 49; *Towers v. Pub. Ser. Comm.*, 95 Atl. 170; *Railroad v. Dustin*, 142 U. S. 492; *Pub. Ser. Comm. v. Railroad*, 89 Atl. 726; *Laird v. Railroad*, 88 Atl. 347; *Railroad v. Towers*, 94 Atl. 330; *Railroad v. Willcox*, 94 N. E. 212. (5) The regulation of rates charged by a public utility as well as the character of service afforded by it under existing franchises is a matter of general State concern. *State ex rel. v. Telephone Co.*, 189 Mo. 83; *Dillon, Mun. Corp.* (5 Ed.) sec. 63. (6) The charter provision purporting to give this power to the city, being in conflict with the State law on the same subject, is unconstitutional and void. It was not competent for the city to make such provision in its charters. *State ex rel. v. Court*, 120 Pac. 861; *Elec. Co. v. Seattle*, 206 Fed. 955; *Power Co. v. Grant's Pass*, 203 Fed. 173.

Alex. Z. Patterson and James D. Lindsay for respondent.

(1) The legislation embodied in the Public Service Commission Act and the finding and order of the Com-

mission in the instant case constitute an exercise of the police power of the State, which is never to be abridged, or so construed as to permit corporations to conduct their business in such manner as to infringe the equal rights of individuals, or the general well-being of the State. Constitution, art. 12, sec. 5; Public Service Commission Act, Laws 1913, and especially section 47, subdivision 2, and sections 49 and 127. (2) The finding of the Public Service Commission in this case is a determination of the coexistence of the conditions prescribed by the legislative power, as authorizing the direct exercise of that portion of the police power of the State delegated to the Commission, and expressed in its order, in this proceeding. Public Service Comm. Act, Laws 1913, sec. 49; *Lime Co. v. Railroad Comm.*, 144 Wis. 523; *Florida v. Railroad*, 56 Fla. 617, 32 L. R. A. (N. S.) 639. It is not necessary to decide whether the Legislature, by the Public Service Commission Act, delegated either judicial or legislative power, or neither of them, to the Public Service Commission. The Commission was empowered by said act to ascertain whether certain specified conditions exist in a given case, and to act upon the same pursuant to a prescribed method, and in accordance with the conditions found to exist. *Monongahela Bridge v. United States*, 216 U. S. 177; *Railroad v. Taylor*, 210 U. S. 281. (3) The Public Service Commission of Missouri has the power, having found the coexistence of the required conditions, to order the Railways Company to make extensions of its lines in the city of St. Louis, and to extend and operate such lines upon streets not covered by existing franchises, subject, however, to the concurrent constitutional right of the authorities of said city, to withhold consent to the use by the company of such streets, or to grant such use upon conditions; such conditions to be consistent with the powers possessed by the city, local, and incidental to its government as a municipality only, closely appurtenant to such constitutional right, and not violative of, but "subject to,

and in harmony with," the general and paramount police power of the State. Public Service Commission Act, Laws 1913; Constitution, secs. 5 and 20, art. 12, and secs. 20, 21, 22, 23, 25, art. 9; State ex rel. v. Telephone Co., 189 Mo. 83; State ex rel. v. Stobie, 194 Mo. 14; Railroad v. State, 29 Okla. 640; Griffin v. Railroad, 150 N. C. 312; Dewey v. Railroad, 142 N. C. 392; State v. Railroad, 164 S. W. 491; Railroad Comm. v. Railroad, 185 Ala. 354, L. R. A. 1915-D, 98. (4) The power granted to the Public Service Commission to order public service corporations to make extensions, additions and improvements in plants, and in service, carries with it, by implication, the power to require all those intermediate things to be done, which are reasonably necessary for the accomplishment of the ultimate object. Railroad v. State, 29 Okla. 640; Railroad Comm. v. Railroad, 185 Ala. 354; State v. Railroad, 164 S. W. 491; Railroad v. Jacobson, 179 U. S. 287, 302; Railroad v. Minnesota, 186 U. S. 257-260; Griffin v. Railroad, 150 N. C. 312; Atlantic Coast Line v. Corporation Comm., 206 U. S. 1-27; Staton v. Railroad, 147 N. C. 428; Mayor v. Railroad, 109 Mass. 103; Railroad v. Railroad Comm., 231 U. S. 457; Railroad & N. Co. v. Fairchild, 224 U. S. 510. (5) The Railways Company was chartered by the State for the purpose of voluntarily acquiring, constructing and operating street railways, for public use, in the conveyance of persons and property in the city of St. Louis, with the consent of the said city, and with the reserved right in the State to alter and amend such charter in such manner, and to such extent as might be necessary for the well-being of the State; and, under this reserved right to alter, and amend, and to prescribe and impose duties from time to time in accordance with changed conditions, the State has the right to require the Railways Company to take those steps, necessary to be taken, to extend its transportation facilities for the public use, and for the satisfying of the public needs in the city of St. Louis. Sec. 5, art. 12, Constitution; Shields v. Ohio, 95 U. S. 319-324; Railroad v. New Haven, 203 U. S.

379-388; Stanislaus Co. v. Canal and Irrigation Co., 192 U. S. 201; and authorities cited under points 3 and 4. (6) The new charter provisions of the city of St. Louis undertaking to give the city power to compel street railways to make extensions, being out of harmony and inconsistent with the general laws of the State, are invalid. The power of consent or denial that may be exercised by the city, to the application of the Railways Company, partakes less of contractual than of governmental power. The court will not presume that the city will deny the application of the company, or that it will attempt to make its consent thereto dependent upon conditions inconsistent with the Constitution and general laws of the State. Sec. 23, art. 9, Constitution; Public Service Commission Act, Laws 1913; Hayes v. Railroad, 111 U. S. 228.

WALKER, J.—In April, 1914, complaints were filed with the Public Service Commission praying that an inquiry be made into the character of service rendered by the United Railways Company of the city of St. Louis. The specifications in said complaints were comprehensive and embraced many phases of street railway service. The Commission, after hearing evidence and making such other investigations and inquiries as it deemed proper, made an order, set forth under six headings or subdivisions. The first, third and fourth related to the manner in which the Railways Company was to operate, manage and conduct its cars; the fifth and sixth prescribed the time and manner of the company's acceptance and compliance with the order; and the second required the company within a specified time to apply to the city authorities for permission to construct and operate certain extensions of the company's system as designated in the order. The company formally expressed its willingness to comply with the order except as required by the second subdivision, which is as follows:

“Ordered 2nd, That the United Railways Company, defendant herein, be and it is hereby directed and re-

quired to make application, within thirty days from the effective date of this order, to the proper municipal authorities of the city of St. Louis, Missouri, for the necessary franchises, permits and authority, and to the property owners for the necessary consents, authorizing said defendant company to construct all of the following sections of track, and that the construction of all of said tracks, which may be so authorized, shall be made within the time herein specified."

Following this the particular lines of the company required to be extended are designated and the times prescribed within which each extension is to be made. Upon the promulgation of this order the company filed a motion for rehearing, and upon its denial made application to the circuit court of the city of St. Louis for a writ of review to determine the validity of that portion of the order to which objection had been made. The circuit court sustained the order of the Commission and the company appeals.

While the proceedings were pending before the Commission the city of St. Louis adopted a new charter, which provides that the city shall have power to regulate rates, quality of use, service and products and methods of conduct and operation of public utilities and at certain times to buy the plant and property of such utilities; and to compel from time to time reasonable extension of facilities for such service. [Sec. 1, art. 1, and sec. 2, art. 19, Charter of St. Louis.]

There is no controversy as to the facts or the regularity of the proceedings and the parties stipulate that the only issues are questions of law, viz., (1) the power of the Commission to order the Railways Company to apply to the municipal authorities of the city of St. Louis for franchises to operate a street railway or extensions thereof in the public streets of said city, and (2) the constitutionality of that portion of the charter of said city authorizing a municipal regulation of public utilities as therein prescribed.

I. Acts creating public service commissions and defining their powers are comparatively new ventures in legislation. Their newness, coupled with their comprehensive character, usually co-extensive with the State, has, as is usual with new laws, caused frequent applications to be made to the courts to secure their construction. This has been especially true in regard to the Missouri law, although it was but recently enacted. Despite this fact, the vexed questions here have not received judicial interpretation, and, except by analogy, little aid is to be derived from the construction given to statutes of this character by courts of last resort in other jurisdictions. The statutes may be, and often are, similar to, if not identical with, our own. But the organic laws of these states are different from ours. In construing our own statute, therefore, the plain limitations of our Constitution must, in conformity with one of the elementary rules of construction, always be kept in mind. It is appropriate in this connection that the provision of our Constitution applicable in the construction of the statute here under review should be quoted. It is as follows:

**Decisions
of Other
States.**

**Constructing
Railway
in Street:
Consent
of City.**

“No law shall be passed by the General Assembly granting the right to construct and operate a street railroad in any city, town, village or on any public highway without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by said street railroad and the franchises so granted shall not be transferred without similar assent first obtained.” [Sec. 20, art. 12, Constitution of Missouri.]

The pertinent parts of the Public Service Act, under which the Commission is seeking to exercise the power here complained of by appellant, is as follows:

“If in the judgment of the Commission, additional tracks, switches, terminals or terminal facilities . . . or any other property, construction, apparatus, equipment, facilities or device for use by any . . . street railroad corporation in or in connection with the trans-

portation of passengers . . . ought reasonably to be provided, or any repairs or improvements to or changes in any thereof in use ought reasonably to be made, or any additions or changes in construction should reasonably be made thereto in order to promote the security or convenience of the public . . . or in order to secure adequate service or facilities for the transportation of passengers . . . the Commission shall, after a hearing, . . . make and serve an order directing such repairs, improvements, changes or additions to be made within a reasonable time and in a manner to be specified therein, and every . . . street railroad corporation is hereby required as directed to make all repairs, improvements, changes and additions required of it by any order of the Commission served upon it . . .” [Sec. 49, Public Service Commission Act, p. 588, Laws 1913.]

The constitutional provision quoted is definite in its terms; discussion as to its purpose would therefore seem superfluous. Under ordinary circumstances little or no question can arise as to the uses and purposes of streets and public highways; and the wisdom in confiding their supervision and control to local authorities, being evident, need not be commented upon. The Constitution but gives affirmative recognition to these facts. However, the enactment of the statute creating the Public Service Commission to effectuate its purpose in the supervision of public utilities, among others street railways, has, under section 49, *supra*, given or attempted to give certain powers to the Commission over streets and highways. The extent of this power under the Constitution is the matter here to be determined. While recognizing the rule that constitutional limitations upon legislative action must be construed in favor of the power of the Legislature and be either expressly declared or clearly implied (*State v. Wilson*, 265 Mo. 1), it must also be borne in mind that when so expressed or implied they are to be construed as mandatory rather than directory (*State ex rel. v. Hitchcock*, 241 Mo. 433) and consequently exclusive in their terms.

It not infrequently occurs that words employed in a constitution or statute are so clear and explicit that an attempt to define them serves but to confuse rather than enlighten. The words "construct" and "operate" as employed in the constitutional provision under consideration are illustrative of this truth. We therefore hazard no further comment as to their meaning and application than to say that to construct as here used means to build upon the street or highway, whether by initial location or extension; and to operate means to use for the purposes of the construction.

The constitutional provision plainly requires as a prerequisite to the enactment of a valid statute for the construction and operation of street railroads that the consent of the local authorities therefor be first acquired. While the language employed in the Constitution, if literally construed, may be held to be directed only to corporations seeking the privilege to construct and operate such public utilities, a reasonable construction of the provision will not justify this limitation upon its meaning; its purpose is not so much to limit the power and define the course to be pursued in securing the right to construct and operate as it is to declare where the power rests which is necessary to be invoked before the rights sought are granted.

The source of this power, viz., the local authorities, having been defined, the terms under which it is granted authorize the conclusion that it is absolute. It is a general rule, applicable here as elsewhere, that constitutional provisions are mandatory; their prohibitions and injunctions must therefore be obeyed. [State ex rel. v. Hitchcock, 241 Mo. 433; 8 Cyc. 762, and cases.] This being true, it is immaterial, so far as the application and extent of the power is concerned, whether the statute enacted in relation thereto be simply permissive, as is usually the case, or mandatory, as in the instant case; a condition precedent to the validity of the statute in any case is that the consent of the local authorities be first obtained. To obviate the application of the Constitution to the statute and as a consequence render the

order of the Commission effective, it is contended by respondents that the statute is either not within or is excepted out of the limitation of the Constitution. The words employed in the Constitution are general and include within their terms any law enacted by the General Assembly in regard to the construction and operation of street railroads. The only limitations are in the designation of the particular class of utilities referred to and the places where they may be constructed and operated. Modifications in the application of the constitutional provision are permissible only in the presence of clearly defined exceptions. We find these neither expressed nor implied and we are consequently not authorized to make them. Subsequent legislation cannot modify the Constitution. It is elementary that in a conflict between the Constitution and a statute the latter must yield. [State ex rel. v. Wabash Railroad Co., 251 Mo. 134; State ex rel. v. C. B. & Q. Ry. Co., 251 Mo. 146.] The creation, therefore, of the Public Service Commission since the adoption of the Constitution and the clothing of it with comprehensive and plenary power in the regulation and control of all public utilities will in no wise modify the course defined by the Constitution as necessary to be observed in the establishment or extension of street railroads.

The purpose of the order here sought to be enforced is to require the appellant to extend its road; that this is sought to be accomplished by indirection is not material; the resultant effect is the same. The order, while not directly requiring the appellant to make the extension, does require it to procure the consent of the proper authorities that (using the language of the order) "the construction of all of said tracks which may be so authorized shall be made within the time herein specified." The purpose of the order is therefore evident, although it is mandatory more by inference than express declaration. However this may be, the very words of the order carry with them a concession that consent is a prerequisite to its enforcement. Consent such as the law recognizes cannot be the

subject of compulsion; its existence depends upon the exercise of the voluntary will of those from whom it is obtained. It is well said in a South Carolina case (*Gray v. Walker*, 16 S. C. 143) that consent "implies an agreement to that which, but for the consent, could not exist, and which the party consenting has the right to forbid." It is even more graphically stated in a Kansas case (*Locke v. Redmond*, 6 Kan. App. 76) where it is said that consent "supposes physical power to act, a moral power of acting, and a serious, determined and free use of these powers." The order, therefore, no matter how mandatory may be its terms, is self-limiting. If, as a prerequisite to its enforcement, the appellant be required, as he is, to secure the consent thereto of the local authorities, and after reasonable effort fails, the order becomes inoperative and loses whatever characteristics it may have had, on its face, as a mandate, because it is incapable of enforcement without the precedent procurement of the necessary consent. A permissive order, such as here seeks judicial sanction, is a contradiction in terms and is unknown to the law. A mandatory order is burdened with no modifications and emanates from a source having power to enforce it. Lacking these essentials it is a mere nullity.

This is not true of the remainder of the order made by the respondents, to which appellant has given compliance; its terms are well within the broad and full power given respondents to regulate and control public utilities, which power, so far as exercised, has not contravened any constitutional provision.

Holding, as we do, subdivision 2 of the order to be inoperative for the reasons stated, it has not been deemed necessary to discuss the question as to whether or not the attempted enforcement of said subdivision involves the making of a contract; nor does the extent of the police power of the State enter into the question when the attempted exercise of the same would result in a violation of the organic law.

In the discussion of the question as to the binding force of subdivision 2, we have proceeded upon the

assumption that section 49 of the Public Service Act, which we have quoted, is sufficiently comprehensive to authorize the order for the enforcement of said subdivision, provided same had not been obnoxious to the Constitution. An analysis of said section renders it questionable whether it can be fairly given that construction. While it provides that the Commission may order, for example as applicable to this case, a street railroad, to construct additional tracks and make such changes, improvements and additions as may "promote the security and convenience of the public . . . or secure adequate service or facilities for the transportation of passengers," these powers are to be construed as subservient to and in harmony with the organic law, for it will not be presumed that the Legislature intended to enact an invalid statute. [Lumber Co. v. Mo. Pac. Ry. Co., 216 Mo. 658; State v. Fawcett, 212 Mo. 729.] A more reasonable construction is that while said section is very broad and contemplates the exercise of many powers in regard to the control of public utilities not heretofore granted, the exercise of these powers was intended to be limited to directing that to be done by the public utility which it is authorized to do under its charter and not that it be compelled, as a prerequisite to a compliance with the order, to procure from the State other rights than those already granted. [Towers v. United Rys. & Elec. Co., 95 Atl. (Md.) 170.]

That the Public Service Commission has ample power to order the construction of such sidetracks, switches, cross-overs and terminals as are purely incidental to the operation of main lines is not questioned; but the Legislature has no constitutional authority, did not intend, and hence the Commission is not empowered, to compel public utilities, in the absence of authority in their charters, to enter new territory by the extension of their lines of roads.

Furthermore, the Public Service Commission, being a creature of the statute, can only exercise such powers as are expressly conferred on it; and the statute conferring such powers, to authorize action thereunder,

Scope of
Statute.

should clearly define their limits. Nothing should be left to inference or seek refuge in implication or the exercise of a discretion. The language of the New York Court of Appeals in *People ex rel. v. Willcox*, 200 N. Y. l. c. 431, 94 N. E. l. c. 215, is apposite in this connection; that: "The public service commissions were given extensive powers; but they should not be extended by implication beyond what may be necessary for their just and reasonable execution. They are not without limits, when directed against the management, or the operations, of railroads, and the commissions cannot enforce a provision of law, unless the authority to do so can be found in the statute. . . . Nor should they reach out for dominion over matters not clearly within the statute." Under this rule we hold, in addition to the other reasons urged against the operative force of that part of the order under consideration, that the terms of section 49 are not sufficiently definite and explicit to empower respondents to order the appellant to take the initiative in procuring the required consent to authorize the extension of its road and that it was not so intended by the Legislature.

II. The validity of certain sections of the charter of the city of St. Louis is assailed as being in conflict with the Public Service Act. These sections, so far as pertinent to this inquiry, are as follows:

City Charter. That the city shall have power "to regulate the construction, maintenance, equipment, operation, service, rates and charges of public utilities, and compel, from time to time, reasonable extensions of facilities for such service. " [Clause 13, sec. 1, art. 1, Charter, City of St. Louis.]

"The Board of Aldermen shall at all times have full power, to be exercised by ordinance, over all public utilities now or hereafter existing in the city, and may regulate the charges for the use, service or product thereof and establish whatever requirements may be necessary to secure efficient use, service or products,

and no terms or conditions contained in any grant shall limit or impair this power." [Sec. 2, art. 19, Charter, City of St. Louis.]

While not material to the validity of these sections, it is a matter of historical interest that they were adopted as a part of the new charter of the city of St. Louis which became operative about two years after the enactment of the Public Service Act. The purpose of the latter was to provide a uniform system throughout the State for the regulation and control of public utilities, and to create and establish a board clothed with ample administrative powers to investigate, hear and determine all matters concerning the conduct and management of such utilities, whether complaints in regard thereto were submitted by the representatives of the latter or their patrons. In thus providing by a State law a means whereby all questions of the character referred to might be heard and determined, it was evidently contemplated by the Legislature that local regulations, such as municipal charters and ordinances adopted for a like purpose as the State law, should, upon the enactment of the latter, become thereby superseded or abrogated; or, if adopted later than the State law, that they should be inoperative and void, otherwise confusion and the consequent defeat of the purpose of the statutes would result from conflicts of authority which would inevitably arise. While the freeholders in certain municipalities, for example the city of St. Louis, may, under the express authority of the Constitution (Sec. 16, art. 9), frame and adopt a charter for their government, they do not thereby acquire the right to assume all powers the State may exercise within its limits, but only those incident to it as a municipality or which concern matters of purely local government. Judge DILLON (Mun. Corp. [5 Ed.], sec. 63), in discussing the rule as above announced, says in effect: "While a city may frame a charter for its government as a city, including all that is necessary to its conduct and management as a municipality, it does not thereby incorporate into its government all the power the State has for the protection of

the rights and the regulation of the duties of the inhabitants of such city as between themselves."

We have several times given express approval to this rule, notably in *State ex rel. v. Telephone Co.*, 189 Mo. 83, where, in defining the meaning of the Constitution in providing that certain cities may frame charters for their own government, we said that "this provision is to be limited as stated in the foregoing rule," and, further elaborating the application of the doctrine, declared that the Constitution does not "confer unlimited power on the city to regulate by its charter all matters strictly local, for there are many matters local to the city requiring governmental regulation which are foreign to the scope of municipal government. In none of the cases that have been before this court bringing into question the charters of St. Louis and Kansas City under the Constitution of 1875 (Sec. 16, art. 9) have we given to the constitutional provision any broader meaning than above indicated." (Citing many Missouri cases.)

The power of the freeholders of the city of St. Louis in framing and adopting the present charter must be held, when properly exercised, to have been limited as in the rule stated. The control and management of public utilities had then been provided for by the Public Service Commission Act; and such control was not a matter of purely local or municipal concern, but one subject to the State legislative will. The power having been thus classified and defined, the attempt of the framers of the charter to also provide for such control constituted an unwarranted invasion of a province clearly within the purview of the State. In so far, therefore, as clause 13 of section 1 of article 1 and section 2 of article 19 of the present charter of the city of St. Louis attempt to provide for the regulation of public utilities for the management and control of which express provision has been made in the Public Service Act, such clause and sections of said charter are declared to be inoperative and of no effect.

In consequence of the foregoing conclusions the judgment of the circuit court is reversed and remanded with directions that it enter a judgment setting aside and annulling the order herein of the Public Service Commission. All concur; *Blair* and *Williams, JJ.*, in paragraph two and in the result.

WOODSON, J. (concurring).—I fully concur in the opinion filed in this case, except as to that part of it which I understand holds that section 49 of the Public Service Commission Act, page 588, Laws 1913, empowers the Commission to order the company to construct and operate new and additional main lines of street railroads, as distinguished from what are generally designated as switches, side tracks, cross-overs and terminals, which are used in conjunction with main lines, to assist and facilitate the transportation of passengers over main lines the company has voluntarily constructed. Such side tracks, etc., are purely incidental to the operation of the main lines, and the Commission has and should have full and ample power to compel their construction; but I do not believe the Legislature intended or has the constitutional authority to compel the company, in the absence of an agreement by charter, or otherwise, to go into new territory and construct new main lines and operate cars over them for the transportation of passengers. That would compel the company, against its will, to invest its means in the construction of lines and conduct a transportation business, perhaps at a dead loss from start to finish. I can conceive nothing which would be more hazardous to capital than that, or which would more completely deprive a person of his property without his consent or without due process of law.

I might be perfectly willing to construct a railroad from Jefferson City to Columbia, and operate cars over the same for the transportation of freight and passengers, but that is no reason why I should be compelled to extend the road north and west to the Iowa line for the same purposes; the former might be a good and paying

investment, while the latter might be a bad investment and a dismal failure.

I know of no law or morals which require anyone to invest his means in a new business enterprise; but where he owns a public franchise of course he should be required to so use it as to yield the greatest good to the public, consistent with earning a reasonable remuneration on the investment.

For the reasons stated, I concur in the result.

ON MOTION TO MODIFY OPINION.

PER CURIAM:—The right to build a street railroad on Lee Avenue may be conceded to have been granted to the predecessor of the United Railways Company, as well as the right of the former to transfer its franchise to the latter company. This latter right is authorized under the 8th subdivision of section 3316, Revised Statutes 1909. The question confronting us here, however, is how long does this privilege or right continue? It was granted to the original company in April, 1892, and in April, 1893, the right was extended, no limitation being stated in the ordinance of extension. Almost twenty-four years have therefore elapsed since the extension of the right, and yet the attitude of the company holding the same has been one of complete inactivity. Under this state of facts is the presumption authorized that the company has abandoned its purpose of extending its line, and if this be true, can it, after the expiration of the period of time stated, now exercise the right originally conferred? If it cannot enforce this right, then it does not exist; and if it does not exist the Public Service Commission should not now be authorized by reason of the original grant to direct the railroad company's conduct in regard to said street as the Commission is empowered to do concerning any other operative portion of the company's franchise. Under the common law an easement may be lost by non-user in twenty years. [3 Bl. Com. 262; *Given v. Wright*, 117 U. S. 648.] We need not concern ourselves as to

whether or not judicial action is necessary to render operative the forfeiture or loss of the right of the corporation to occupy the street, because the determination of the question here under consideration does not involve the forfeiture of the company's charter or all of its franchises, but simply one of same, or a right granted under such charter. It may be conceded that a judicial forfeiture is necessary if the right to exercise the charter be involved, but the consent of a municipality to the occupation of its streets by a railroad company, while involving a grant of power to the railroad company and the right to exercise such power when granted, is not technically speaking a contract, but is in the nature of a privilege or license extended to the company so as to secure facilities for the accommodation and convenience of its citizens. [G. C. Ry. Co. v. G. C. S. Ry. Co., 63 Tex. 529; Chicago City Ry. Co. v. People ex rel. Story, 73 Ill. 541.] The right must of course be based on a charter, but it is but one of the rights granted thereunder. This being true, the conclusion is authorized that the failure by the corporation to exercise this right may be lost through lapse of time, and that a judicial forfeiture necessary when the existence of the charter is involved is not necessary in a case of this character to render the particular forfeiture effective. A ruling illustrating the correctness of this conclusion is to be found in the case of Oakland R. R. Co. v. Railroad, 45 Cal. 373, where a corporation was granted the right to construct and operate a railway in the streets of a city, but the work was to be commenced within six months and completed within five years, otherwise the privileges were to cease and be forfeited. The work was not commenced or completed within the time specified. Thereafter the right to use the street for like purposes was granted to another corporation; a contest arising between the two corporations, the former was held to have forfeited its franchise and a judicial proceeding to effect that end was not held to be necessary. A like ruling under a similar state of facts is to be found in N. Y., H. & N. R. R. Co. v. Boston,

H. & E. R. R. Co., 36 Conn. 196; In the Matter of Brooklyn, W. & N. Ry., 72 N. Y. 245, and In the Matter of Kings County Elevated Ry. Co., 41 Hun, 425. Our own court, in State ex inf. Jones v. Light & Development Co., 246 Mo. 618, where the grantee of the franchise was authorized to place wire, tubes and cables conveying electricity for the production of light and power along the streets, alleys and public places of the city of St. Louis, failed for a long period of time to exercise its rights under said franchise, the same was held to be a wilful non-user and a practical abandonment of any rights granted thereunder. In the subsequent case of State ex inf. v. West End Light & Power Co., 246 Mo. 653, it was held that the law will be strictly construed as against the existence of the particular franchise and in favor of the public, and that where it is shown that the company has made no effort to exercise the franchise for twenty years after the granting of same, such non-user works a forfeiture. These cases, however, were proceedings in *quo warranto*.

Despite the fact that these rulings were rendered in cases in which judicial action was invoked to forfeit the franchises, they constitute persuasive arguments in favor of the conclusion that when the facts, as in the instant case, involve the right to use the street, Lee Avenue, for the purpose of a street railway and same has not been exercised by the railway company for the period of time stated, the right cannot be enforced by the company and the converse of the proposition must be true, that the Public Service Commission is not authorized to enforce action by the railway company.

That the right of the Commission to direct the action of the railway company under its original grant to construct its road upon Lee Avenue does not now exist finds support by analogy in our ruling in State ex rel. v. Associated Press, 159 Mo. 410. This was an application for a writ of mandamus to compel the Associated Press to grant relator certain privileges which had been possessed under its charter by the respondent.

In ruling upon the right of the relator to the writ we held that whatever power the respondent had possessed under its franchise in regard to the matter in question, it had abdicated or lost same through non-user and hence the writ was denied. The motion, therefore, to modify the opinion is overruled.

BOND, J. (concurring in Per Curiam Opinion).—Whether the Railways Company had abandoned its franchise by twenty-four years of non-user, was a judicial question (*State ex rel. v. Railway Co.*, 140 Mo. l. c. 552; *Roanoke Inv. Co. v. Railroad*, 108 Mo. l. c. 64) which it was not the province of the Public Service Commission to determine. Hence that body had no authority to direct the appellant under the circumstances disclosed by the record, to begin work anew under the franchise granted to its predecessor in April, 1892, and its order to that effect was properly set aside in the original opinion. Wherefore there is no merit in the motion for a rehearing.

BAMBRICK BROTHERS CONSTRUCTION COMPANY v. SEMPLE PLACE REALTY COMPANY;
J. DENNISON LYON, Trustee, et al., Appellants.

Division One, March 30, 1917.

1. **SPECIAL TAX BILL: Sewer District: Description by Parcels Instead of by Entire Enclosure.** Where the charter provided for the issuance of a "special tax bill against each lot or parcel of ground in the joint sewer district, giving the name of the owner," and declared that "the word 'lot' as used in this section shall be held to mean the lots as shown by recorded plats of additions or subdivisions, but if . . . the owners of property have disregarded the lines of lots as platted, and have treated two or more lots or fractions thereof as one lot, then the whole parcel of ground or lots so treated as one, shall be regarded as a lot," tax bills which describe the property by subdivisions and boundaries according to

Construction Co. v. Realty Co.

the recorded plat are not void, although the area (Semple Place) covered by the plat has been sold as a body under a prior deed of trust, if there is substantial evidence that there were "parcels of ground" substantially commensurate with the subdivisions outlined in the recorded plat and that they had been so treated by the owners; and there being substantial evidence to support the finding of the trial court on the question, it is not for review on appeal.

2. **CONSTITUTIONAL LAW: Statute Applicable to Only One City.** A classification according to population which applied at the time of its enactment and up to the present time to only one city, does not render the statute unconstitutional.
3. ———: **Notice of Suit: Filing With Comptroller.** Sections 9848 and 9849, Revised Statutes 1909, requiring notice of suit brought on a special tax bill to be filed within ten days with the city comptroller, and declaring that unless such notice is filed and suit is brought within two years the lien shall cease, do not condition the right to sue, or to maintain the suit after its institution, upon the filing of said notice. All legitimate objects of the notice are subserved if it is filed before the trial and the expiration of the lien.
4. **ATTACHMENT: Abatement: Entrance of Appearance: Special Tax Bills.** The judgment should not sustain an attachment sued out in the action on a special tax bill on the ground of non-residence, or adjudge the costs of the attachment against the defendant, if he enters his personal appearance to the action.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow*, Judge.

AFFIRMED (*conditionally*).

C. R. Skinker for appellants.

(1) The trial court erred in rendering judgment for plaintiff on the bills, and overruling appellants' motions for new trial, because the city had no power to assess according to the Semple Place plat, and to divide the land according thereto, for the reasons: (a) The definition of "lot" in section 14 of article 6 of the charter applies to "lot" in section 22 of the same article. *Powell v. Sherwood*, 162 Mo. 614; *Dixon v. Caudill*, 143 Ky. 623; *State v. Allison*, 155 Mo. 330; *United States v. Miller*, 208 U. S. 37; *Plummer v. United States*, 224 U. S. 137; *Railroad v. United States*, 208 U. S. 452;

Crossan v. City, 80 N. J. L. 511; Snyder v. Compton, 87 Texas, 379; Parshall v. State, 138 S. W. 765; Rains v. Stone, 123 Pac. 871; In re Kohler, 79 Cal. 313. They are parts of one system of law in *pari materia*. Sales v. Paving Co., 166 Mo. 671; State ex rel. v. Patterson, 207 Mo. 145; State ex rel. v. Gordon, 261 Mo. 646. (b) The tax bills divided the land according to the Semple Place plat, which had many years before been nullified by sale under deed of trust, a matter of public record long prior to the initiation of the sewer project. McShane v. Moberly, 79 Mo. 43; Paving Company v. McManus, 244 Mo. 184. (c) Such division was without legal authority and the bills are therefore void. St. Louis Charter, sec. 14, art. 6; Cooley, Con. Lim. (3 Ed.), p. 738; Upton v. People, 176 Ill. 632; People v. Clifford, 166 Ill. 165; People v. Railroad, 96 Ill. 372. (d) The power of the city to assess is measured by the mode granted by said section 14, but the power actually exercised was not granted and is *ultra vires* and the whole proceeding is void. Ruggles v. Collier, 43 Mo. 377; Verdin v. St. Louis, 131 Mo. 97; Zottman v. San Francisco, 20 Cal. 96; St. Louis v. Clemens, 43 Mo. 404; Kiley v. Oppenheimer, 55 Mo. 374; Leach v. Cargill, 60 Mo. 316; Trenton v. Coyle, 107 Mo. 193; Nevada v. Eddy, 123 Mo. 558; Perkinson v. Hoolan, 182 Mo. 189; Whitworth v. Webb City, 204 Mo. 601; Albers v. St. Louis, 188 S. W. 83. (e) The enforcement of the bills by the judgments according to the Semple Place plat violates section 30 of article 2 of Missouri Constitution. Chicago v. Wells, 236 Ill. 130; St. Louis v. Hill, 116 Mo. 527. And the Fourteenth Amendment to the Federal Constitution, since both charter and ordinance following it are State laws. Waterworks v. Refining Co., 125 U. S. 31; Gast Co. v. Schneider Co., 240 U. S. 55. (2) The judgments below were further erroneous because in defiance of Secs. 9848 and 9849, R. S. 1909, which is (a) not a special law within the prohibition of section 53 of article 4, Missouri Constitution. State ex inf. v. Southern,

Construction Co. v. Realty Co.

265 Mo. 286; State ex rel. v. Speed, 183 Mo. 201; Board v. St. Louis, 267 Mo. 366; State ex rel. v. Mason, 153 Mo. 35; State ex rel. v. Mason, 155 Mo. 502. (b) And is not directory, but mandatory by phraseology. Cooley, Taxation (3 Ed.), p. 479; Stayton v. Hulings, 7 Ind. 144. (c) Mandatory, because for the protection of the land owner. Cooley, Taxation (3 Ed.), pp. 480, 484; Leslie v. St. Louis, 47 Mo. 477; St. Louis v. Glasgow, 254 Mo. 277; Leavitt v. Eastman, 77 Me. 120; In re Bledsoe Hill, 200 Mo. 643. The statutory requirement of additional notice to process does not invalidate the act. In re Powers, 29 Mich. 504; Davis v. Sawyer, 66 N. H. 34; Tinslar v. Davis, 12 Allen, 79; Coulter v. Stafford, 56 Fed. 565; Oulahan v. Sweeney, 79 Cal. 537; Grant v. Berrisford, 94 Minn. 49; Surety Co. v. Architectural Co., 226 U. S. 281; Henley v. Myers, 215 U. S. 273. The analogous statute, Sec. 8231, R. S. 1909, prescribing recording of notice of intention to file a mechanic's lien against a non-resident owner within a time certain, requires exact obedience as to time. Schubert v. Crowley, 33 Mo. 564. So does the analogous Sec. 9111, R. S. 1909, prescribing notice of injury and claim against certain municipalities. Lyon v. St. Joseph, 112 Mo. App. 681; Reno v. St. Joseph, 169 Mo. 642. The presumption of payment and extinguishment of the lien raised by the act is conclusive and not rebuttable by evidence. Wilson v. Iseminger, 185 U. S. 55; Waterworks v. Oshkosh, 187 U. S. 444. The law may extinguish the claim as the result of failure to give the notice as prescribed by statute. Champion v. Ames, 188 U. S. 358; Frisbie v. United States, 137 U. S. 166; Karnes v. Insurance Co., 144 Mo. 417. No other time than that prescribed by the act can suffice. Anderson v. Pemberton, 89 Mo. 64; Mears v. Spokane, 22 Wash. 323. (3) The trial court further erred in sustaining the attachments after appearance and answer of appellants to the merits, plaintiff having given no bond and the sole ground of attachment being non-residence. Sec. 2298, R. S. 1909. And in taxing costs thereof against appellants. Secs. 2298, 2335, R. S. 1909; Hill v. Bell, 111 Mo.

41; *Tootle v. Lysaght*, 65 Mo. App. 145. Costs are never visited upon a party unless the statute strictly construed in his favor makes him liable therefor. *Shed v. Railroad*, 67 Mo. 690; *State ex rel. v. Gordon*, 245 Mo. 28.

T. J. Rowe, Thos. J. Rowe, Jr., and Henry Rowe for respondent.

(1) The defense set up in answer that plaintiff did not comply with the provisions of the act entitled "An Act for the giving of notice of suit on special tax bills in cities of 300,000 or more and limiting the lien of special tax bills" (Laws 1909, p. 704; Secs. 9848-9849, R. S. 1909) is without merit because; (a) the act is unconstitutional, being special legislation; (b) the first section of the act is merely directory, and the plaintiff can at any time before final judgment is entered in the cause file the notice, required by said section, with comptroller; and (c) the suits mentioned and described in the petition herein were not commenced in any city—they were commenced in the circuit court of the city of St. Louis. No suit can be commenced in a city; it must be commenced in a court. Art. 4, sec. 53, subdiv. 17, Constitution. (2) The finding of facts by the trial court in favor of the plaintiff are conclusive and this court will not review the facts so found by the trial court. *Fruin v. Meredith*, 144 Mo. App. 586. (3) The parcels of property can be identified by the description contained in the several tax bills; therefore, the special tax bills are valid and the judgment should be sustained. *Const. Co. v. Levy*, 64 Mo. App. 430; *Adkins v. Quest*, 79 Mo. App. 36; *St. Louis v. Calhoun*, 222 Mo. 54; *St. Louis v. Koch*, 169 Mo. 587.

BOND, P. J.—I. Plaintiff, the Bambrick Brothers Construction Company, a corporation, instituted twenty-one separate actions to enforce the lien of as
Statement. many special tax bills against separate parcels of land in St. Louis owned by the various defendants, said tax bills covering the cost of the construction

of the second section of the South Harlem Joint District Sewer. The petition in each case was similar in form, the variance being the parties defendant and the description of the parcels of land against which the tax bills were issued.

The petition pleaded the passage of an ordinance by the city of St. Louis to establish a sewer district to be known as the South Harlem Joint Sewer District; that said district was established and an ordinance passed for the construction of the second section of said Joint District Sewer; that provision was made for the payment of the city's portion of the cost of same; that plaintiff entered into a contract with the city in accordance with the charter and ordinance; that upon the completion of the work, the President of the Board of Public Improvements computed the cost and assessed the same as a special tax upon all the property in the South Harlem District and special tax bills were made out, registered, countersigned and delivered to plaintiff. The petition then alleged the ownership of the lot, the amount computed, assessed and charged against the lots described, the designation of the Franklin Bank as the depositary to receive payment; delivery of notice of the tax bill to the City Marshal, the return on the tax bill that the persons named could not be found, and prayed judgment for the amount of the special tax bill and that same be adjudged a lien on each particular parcel of land and that same be sold to pay the amount of the special tax and costs.

The answer in nineteen of the suits, besides a general denial, averred that plaintiff did not file with the comptroller of St. Louis a written notice of the filing of the suits, and in certain of the suits it was averred that certain proceedings were still pending on behalf of the city of St. Louis for the condemnation of specified streets.

Plaintiff's reply was a general denial and a denial of the new matter of the various answers.

By agreement all of the suits were tried together in Division No. 8 of the circuit court of the city of St. Louis.

The court rendered final judgment in each of said cases in favor of the plaintiff and against the various defendants and declared each of said special tax bills a lien upon the particular parcel of land described therein, together with interest and costs and ordered that the land be sold to pay the same. The defendants appealed. Seven of these appeals are comprised in this record; three are comprised in our Docket No. 18472 and eleven in No. 18473.

II. There is no question that the work done by the contractors in this case has gone into the betterment of the property of defendants, nor that it was performed in accordance with the contract under which the work was let; nor that it has enhanced the value of the property of the defendants as contemplated when the improvements were ordered by the city authorities. [Sheehan v. Owen, 82. l. c. Mo. 465.]

The only questions presented by the appeal are certain objections to the validity of the tax bills under the charter provisions of the city of St. Louis.

The first position taken by appellants is that the tax bills are void because not issued in accordance with section 22 of article 6 of the St. Louis charter, which provided for the issuance of a
Lot or Parcel of Ground. "special tax bill against each lot or parcel of ground in the joint sewer district, giving the name of the owner thereof," etc. It is contended that the phrase "lot or parcel of ground" is defined by the following language contained in section 14 of article 6 of the St. Louis charter:

"Lot defined—The word 'lot' as used in this section shall be held to mean the lots as shown by recorded plats of additions or subdivisions, but if there be no such recorded plat, or if the owners of property have disregarded the lines of lots as platted, and have treated two or more lots or fractions thereof as one lot,

Construction Co. v. Realty Co.

then the whole parcel of ground or lots so treated as one, shall be regarded as a lot for the purposes hereof."

Also that in view of the evidence showing that at the time of the issuance of the tax bills in suit, the area covered by the recorded plat (according to the subdivisions and boundaries of which the tax bills were issued, known as Semple Place), had been sold out as a body under a prior deed of trust, leaving nothing thereafter but one enclosure for the entire tract; therefore one tax bill should have been issued against the whole tract.

It will be noted in comparing the two provisions of the charter that the latter defining the word "lot" and the sense in which it is to be used, does not purport in any way to define what shall be the significance of the phrase "parcel of ground." Unless, therefore, appellants are able to show that the property affected by the tax bills in suit does not disclose the several "parcels of ground" designated in the tax bills, there is no merit in their contention that the judgment in this case fixing a lien on these several parcels of ground, violated the charter. On that point not only was the recorded plat of Semple Place, as it was subdivided prior to the enforcement of the mortgage on the entire tract, before the trial court, but all the facts and circumstances in evidence bearing on the question of the usage by defendants of the several tracts of land formerly described by that plat, including the testimony tending to show one enclosure, and from all the evidence the learned trial judge evidently found that there were "parcels of ground, the subdivisions whereof were substantially the same as those contained in the recorded plat of Semple Place, against which the tax bills in suit were issuable. The question of fact having been resolved against appellants' contention that no such distinct parcels of ground" existed at that time, nothing is left for review. [Gannon v. Gas Light Co., 145 Mo. 502.] We conclude, therefore, that the tax bills in this case were not issued without authority under the charter, and that the judg-

ments recovered by plaintiff were not, for that reason, erroneous.

It necessarily follows from this conclusion, that the enforcement of the tax bills did not contravene the terms of the charter, *supra*, providing for their issuance, and hence does not amount to a taking of the property of appellants without due process of law.

III. It is also urged by appellants that the judgments in these cases were erroneous for the reason that respondent failed to give written notice within ten days after the institution of the suits, setting forth when and in what court they were brought, and to file the same in the office of the comptroller of the city as required by sections 9848, 9849, Revised Statutes 1909, which prescribe the giving of such notice and also the time within which a lien of tax bills shall cease, and the time within which, in the absence of such suits or notices, the tax bills shall be presumed to have been paid and requiring an entry of the expiration of the liens. All these suits were commenced in December, 1912, and the notices in question were not given by plaintiff until September 15, 1913.

These sections of the statute were not unconstitutional for that, until the present time, no city of the State had attained the population of three hundred thousand except the city of St. Louis, which is the only municipality falling within the description to which the acts under review are applicable. [See title to acts in question, Laws 1909, p. 704.] The propriety of such a classification according to population has been settled in this State. [State ex inf. v. Southern, 265 Mo. l. c. 286.] Whether the act in question is obnoxious to the constitutional provision forbidding the Legislature to pass any local or special law which regulates "the practice or jurisdiction of . . . any judicial proceeding or inquiry before the courts," etc. (Constitution, art. 4, sec. 53, par. 17), or whether these acts violate paragraph 32 of section 53 of article 4 of the Constitution, are questions which need not be ruled in the view we take of the meaning and purpose expressed by the acts.

It will be observed that section 1 of the act under review deals wholly with the manner of giving notice in writing within ten days thereafter of the filing of a suit on a special tax bill and the record of such notice in the office where the record of such special tax bills is required to be kept.

"Sec. 1. Whenever any suit shall be commenced in any city of this State now having, or which may hereafter have a population of three hundred thousand or more inhabitants, on any special tax bill to enforce the payment of the lien thereof, the party or parties plaintiff shall, within ten days after the commencement of such suit, file with the comptroller or other officer of such city, in whose office the record of such special tax bills is required to be kept, a written notice setting forth when and in which court such suit was brought; and the comptroller or such other officer shall immediately note such facts on the record of such tax bill.

"Sec. 2. The lien of every such tax bill shall cease, end and determine in two years after said tax bill, or the last installment thereof, if the same be payable in installments, shall have become due and payable, unless suit shall have been brought on such tax bill, and notice of such suit, as hereinbefore required, shall have been given and filed within that time. If within said time no such suit was brought or if within said time no such notice of suit shall have been filed, the tax bill shall be presumed to have been paid, and the comptroller, or other proper officer, shall make an appropriate entry on the record of the tax bill in his office that the lien thereof has expired by lapse of time." [Laws 1909, p. 704.]

These sections are intended to *direct* that notice thereof shall be given ten days after suit. They do not *condition* the right to sue upon the giving of a subsequent notice, nor the right to maintain a suit for failure to give notice after its institution. Such a notice is not in any sense a summons or other method of giving the court jurisdiction and could answer neither purpose, since it is only enjoined *after* the suit has been brought and *after* jurisdiction of the person or property have

attached. All the objects legitimately within the scope of this notice are subversed if it, as was done in the present cases, is filed before the trial and expiration of the time fixed for the lapse of the lien of the tax bills. We hold, therefore, that the statutes under review, if valid, do not affect the right of respondent to the judgments obtained under the tax bills in suit.

IV. It is finally contended that the judgments should not have sustained the attachments in those cases sued out on the ground of non-residency, nor have awarded the costs of such attachments against the appellants, since they entered their personal appearance to the actions. This assignment of error is well taken. [R. S. 1909, sec. 2298; Bambrick Bros. Const. Co. v. McCormick, 157 Mo. App. l. c. 204.]

The judgments herein on the merits were correct and will be affirmed, provided respondent within ten days enters a *remittitur* of all the costs of the attachments adjudged in its favor. The costs of this appeal are adjudged against respondent.

All concur, *Blair, J.*, in paragraphs 1, 2 and 3 and result.

BAMBRICK BROTHERS CONSTRUCTION COMPANY v. LOUISE S. CLARKE et al., Appellants.

Division One, March 30, 1917.

SPECIAL TAX BILLS: District Sewer: Suit Pending to Establish Street.

If the proceeding to condemn land for streets through the area taxed with the costs of a joint district sewer, is undetermined and open to cessation on the part of the city authorities at the time of the trial of the action on the special sewer tax bills, the projected streets are not streets in the sense of the charter excluding them as a part of the area assessable for sewer taxes, and if they become streets the money paid for them will stand in lieu of the land taken, and hence the tax bills issued against subdivisions of the area are not void because those projected streets were not excluded.

Appeal from the St. Louis City Circuit Court.—*Hon. James E. Withrow*, Judge.

AFFIRMED.

C. R. Skinker for appellants.

(1) Each of the pretended parcels described in each of the tax bills was divided into two or more parcels by streets established by the same authority which issued the bills, and prior to the establishment of the boundaries of the sewer district, and the bills are therefore void since they do not describe the land as required by section 14 of article 6 of the charter. (a) Ordinances Nos. 24021 and 24020, respectively establishing Ashland and Lexington avenues, operated as a taking of the strips therein designated for the public use upon the dates they respectively took effect, within the meaning of sections 2 and 30 of article 2 of Missouri Constitution. *St. Louis v. Hill*, 116 Mo. 527; *St. Louis v. Brown*, 155 Mo. 562; *Parks v. Boston*, 15 Pick. 198; *Burt v. Insurance Co.*, 115 Mass. 7; *Edmands v. Boston*, 108 Mass. 547; *Dorgan v. Boston*, 12 Allen, 231; *Whitman v. Railroad*, 7 Allen, 326; *Hampden Co. v. Railroad*, 124 Mass. 119; *Railroad v. Miller*, 125 Mass. 13; *In re Public Parks*, 99 N. Y. 580; *In re Public Parks*, 53 Hun, 290; *Rexford v. Knight*, 11 N. Y. 308; *Commissioners v. Armstrong*, 45 N. Y. 234; *In re Delafield*, 109 Fed. 577; *Johnston v. Callery*, 225 Pa. 417; *Graybill v. Ruhl*, 225 Pa. 417; *Railroad v. Burson*, 61 Pa. 369; *Rubottom v. McClure*, 4 Blackf. 507; *Hankins v. Lawrence*, 8 Blackf. 266; *Railroad v. Murdock*, 68 Ind. 137; *Kennedy v. Indianapolis*, 103 U. S. 602; *Cavanaugh v. McLaughlin*, 38 Minn. 83. (b) The taking and the ascertainment of compensation upon which investment of title by payment depends are two totally different things. The former is the act of the sovereign Legislature. *Bridge Co. v. Stone*, 174 Mo. 22; *Lankford v. Shively*, 174 Mo. 551; *Uhlig v. St. Louis*, 44 Mo. 463. The latter involves merely the exercise of judicial power. *Plum v. Kansas City*, 101 Mo. 531. (c) The taking is fully accomplished when

the land is designated by the Legislature for the public use, notwithstanding the title may not vest by payment of compensation for the taking until long afterward. Taking and investment of title are not contemporaneous, nor is the latter necessary to accomplish the former. *St. Louis v. Hill*, 116 Mo. 527; *Burt v. Insurance Co.*, 115 Mass. 7; *In re Public Parks*, 99 N. Y. 580; *Re Delafield*, 109 Fed. 577; *Kennedy v. Indianapolis*, 103 U. S. 602. (b) The only effect of default in payment of compensation is to render the condemnor a trespasser *ab initio*. *Kennedy v. Indianapolis*, 103 U. S. 602. (c) The strips taken by said ordinances for said avenues long before the boundaries of the sewer district were ever established by the same authority, divide each of the parcels described in the bills into two or more parcels. (2) To exact from defendants assessments for this sewer upon the same land taken by the same authority for avenues, is a deprivation of their property without due process. *St. Joseph v. Crowther*, 142 Mo. 162. (3) This court cannot now recede from the construction placed on section 21 of article 2 of Missouri Constitution in determining the effect of similar ordinances in *St. Louis v. Hill*, 116 Mo. 527, and *St. Louis v. Brown*, 155 Mo. 545, existing when Charles J. Clarke bought the land in question at trustee's sale, without impairing the obligation of his contract of purchase within the inhibition of the Federal Constitution. *Muhlker v. Railroad*, 197 U. S. 544; *Louisiana v. Pillsbury*, 105 U. S. 294; *Butz v. Muscatine*, 8 Wall. 584; Sec. 25, art. 6, Charter; *Maguire v. Savings Assn.*, 62 Mo. 344; *United States v. Macon County*, 99 U. S. 582; *Williamson v. Brown*, 195 Mo. 328; *Kansas City v. Association*, 145 Mo. 53; *St. Louis v. Contracting Co.*, 202 Mo. 465; *Perkins v. Thornburgh*, 10 Cal. 191; *Gegiow v. Uhl*, 239 U. S. 3. The tax is an inseparable entirety. *Williams v. Talladega*, 226 U. S. 404; *Leloup v. Mobile*, 127 U. S. 640, 647; *Kansas City v. O'Connor*, 82 Mo. App. 660; *Warren v. Commissioners*, 181 Mass. 11; *Dyer v. Chase*, 52 Cal. 441; *Bennett v. Emmetsburg*, 138 Iowa, 81. To do so without statutory authority would convert the

court into the assessing authority which is not permissible. *Re New York School*, 75 N. Y. 329.

T. J. Rowe, Thos. J. Rowe, Jr., and Henry Rowe for respondent.

The area of the proposed streets was properly included in the parcels of property described in the tax bills. In describing the parcels these proposed streets were properly disregarded. (1) Ashland, Lexington and Belt Avenues have never been opened through the property, and condemnation proceedings were and had been for several years pending, at the time of the trial of this case, for the opening of these streets, exceptions to the report of the commissioners having been filed by J. Denniston Lyon. These proceedings are still pending. Such being the case, these proposed streets through the property are not streets within the meaning of the section of the charter requiring the cost of sewers to be assessed against the property exclusive of streets, avenues, public highways and alleys. The area of these streets was properly included. *Charter of St. Louis (1876)*, art 6, secs. 9, 22; *Kansas City v. Ward*, 134 Mo. 183; *Plum v. Kansas City*, 101 Mo. 525; *Shoemaker v. U. S.*, 147 U. S. 321. (2) The condemnation proceedings may be abandoned at any time, the purpose of the proceedings being to ascertain the cost of opening the streets, and, if too great, to permit an abandonment. *Charter of St. Louis (1876)*, art. 6, sec. 10; *Eyssell v. St. Louis*, 168 Mo. 613; *Silvester v. St. Louis*, 164 Mo. 601; *State ex rel. v. Hug*, 44 Mo. 116; *Simpson v. Kansas City*, 111 Mo. 237; *Whyte v. Kansas City*, 22 Mo. App. 409. (3) The commission to assess some property within the improvement district does not invalidate the tax bill. *Creamer v. McCune*, 7 Mo. App. 91; *Walsh v. Bank*, 139 Mo. App. 648; *Neil v. Ridge*, 220 Mo. 242; *O'Dea v. Mitchell*, 144 Cal. 374; *Rich v. Chicago*, 152 Ill. 18; *Allen v. Commissioners*, 176 Ill. 113; *State v. Bayonne*, 60 N. J. L. 406; *Granite Co. v. Realty & Inv. Co.*, 259 Mo. 153. (4) When the streets

are actually condemned and the money paid into court, the money stands in lieu of the land as regards the lien of the special tax bill. *Ross v. Gates*, 117 Mo. App. 237. (5) If the amount of the assessment against this property is wrong because of the inclusion of streets and alleys that ought not to have been included, the excess is a mere matter of mathematical computation and can be deducted from the amount of the bills in rendering final judgment. *Walsh v. Bank*, 139 Mo. App. 648. (6) The defendant cannot complain in a special assessment that he was undertaxed; nor can he complain of overassessment, unless he tenders the amount due. *State ex rel. v. Flad*, 26 Mo. App. 500; *Overall v. Ruenzi*, 67 Mo. 207; *Dickhaus v. Olderheide*, 22 Mo. App. 79.

BOND, P. J.—The record in this case contains the appeals in three of the tax bills suits brought by respondent against appellants wherein, in addition to the points presented in *Bambrick Bros. v. Con. Co. v. Realty Co.*, *ante*, page 450, and which we have decided as shown in the opinion in that case, the further defense is made that condemnation proceedings had been begun to open streets through portions of property described in the tax bills.

We conclude that the assignment of error based on this fact is untenable under this record, which shows that the proceedings to condemn were *in fieri* at the time of the trial, being then undetermined and open to cessation on the part of the city authorities. [Municipal Code, p. 362; City Charter, art. 4, sec. 10, art. 6, sec. 9; *Eyssell v. St. Louis*, 168 Mo. l. c. 613; *Silvester v. St. Louis*, 164 Mo. 601; *Kansas City v. Ward*, 134 Mo. 172.] For the above reason the projected streets were not then streets in the sense of the charter excluding them as a part of the proportional area of the whole district assessable for sewer taxes (Charter, art. 6, sec. 22), and if they ever become streets, the money paid for them will stand in lieu of the land taken. [*Ross v. Gates*, 183 Mo. l. c. 347, 117 Mo. App. l. c. 243.]

For these reasons and those stated in the opinion in *Banmbrick Bros. Construction Co. v. Realty Co.*, *ante*, page 450, the same judgments are entered in these cases. All concur, *Blair, J.*, in result.

THE STATE ex rel. T. J. DOUGLAS, Collector of the Revenue, for Benefit of DRAINAGE DISTRICT NUMBER FOUR OF DUNKLIN COUNTY, Appellant, v. C. C. REDMAN.

Division One, March 30, 1917.

1. **DRAINAGE DISTRICT: Additional Assessments to Meet Bonds: Power of County Court.** A drainage district organized under the County Court Act of 1905 and previous acts has no power, even though the benefits reported were in excess of the assessments and the aggregate assessments were less than the bond issue, to subsequently increase the assessments so as to raise enough money to pay the bonds and interest in full as they accrue, but under the then statute exhausted its powers when it made its first assessment.
2. ———: ———: ———: **Subsequent Statute Giving Power: Effect on Meaning of Prior Statute: Legislative Construction.** Even if it be true that the Act of 1913, Laws 1913, pp. 274, 281, made specific provisions for an additional levy of assessments to pay debts of a drainage district and such act be considered a legislative construction to the effect that no such power previously existed, that would be only persuasive, and the power to levy additional assessments must still be found in the previous law under which the district was organized, for the Act of 1913 is not retroactive.
3. ———: ———: **Final Judgment: Reopening.** The Act of 1905, Laws 1905, pp. 185, 187, contemplated that the charges against all the tracts of land in the drainage district organized in the county court would be large enough to pay the costs of the improvement, including the bonds; but it also contemplated but one action by the court, and that in said action, after the report of the viewers and engineers and its modification upon exceptions filed by land owners, the court's order sustaining the report as modified would become a final judgment, unless appealed from and reversed; and being final, whether the amount was too small or too large, it was

State ex rel. v. Redman.

still a finality as to the land owner, and could not be corrected or the assessments increased years afterwards when it was discovered that the assessments were not equal to the bonds issued and will not yield enough money to pay the bonds. The law contemplated but the one action by the county court.

Appeal from Dunklin Circuit Court.—*Hon. W. S. C. Walker*, Judge.

AFFIRMED.

Fort & Zimmerman, Ely, Pankey & Ely and Oliver & Oliver for appellant.

(1) The defendant was not entitled to a separate or special notice of the filing of the petition for the increase of the assessments on his lands as made in the county court order of April 29, 1912. Defendant having been made a party in the beginning, he was in court at all times and for all purposes, so far as this district was concerned. *State ex rel. v. Wilson*, 216 Mo. 282; *State ex rel. v. Bates*, 235 Mo. 287; *State ex rel. v. Young*, 255 Mo. 635; *Barnes v. Construction Co.*, 257 Mo. 195; *Page and Jones, Taxation by Assessment*, sec. 738, note 9; *People v. Chapman*, 127 Ill. 392; *Stone v. Drainage Dist.*, 118 Wis. 399. (2) The county court had ample authority to increase the assessments on the lands within the district. Especially so when the total assessments did not equal the benefit. *Sheridan v. Fleming*, 93 Mo. 321; *State ex rel. v. Holt County*, 135 Mo. 545; *State ex rel. v. Bates*, 235 Mo. 293; *Page and Jones, Taxation by Assessment*, secs. 954-955; *State ex rel. v. Holt County*, 136 Mo. 474; *Morrell v. Drainage Dist.*, 118 Ill. 139; *Lursk v. Chicago*, 211 Ill. 190. (3) Interest on the assessment is no part of the assessment and should not be considered in determining whether the assessment exceeds the benefit. It is conceded that the assessments, exclusive of interest, do not exceed the benefits in the case at bar. Sec. 8316, R. S. 1899; Sec. 5622, R. S. 1909; Laws 1905, p. 187; Sec. 5596, R. S. 1909. It is elementary that interest

on an obligation is never included in determining whether the obligation is of a sufficient amount to confer jurisdiction on any tribunal where that tribunal's jurisdiction depends upon the amount involved. (4) The drainage statutes of this State must be liberally construed and the full intent of the Legislature read into them. State ex rel. v. Bugg, 224 Mo. 554; State ex rel. v. Bates, 235 Mo. 288.

Bradley & McKay for respondents.

(1) If the facts as disclosed in the cases cited by appellant in support of his contention under the first assignment of error were similar to the facts disclosed by the case at bar, then respondent admits that no additional notice would be necessary before making the order placing additional taxes upon respondent's lands, but in each of those cases cited the facts are very different from the facts in the case at bar. (2) The county court was without jurisdiction to make its order of April 29, 1912, readjusting and raising the amount of taxes against defendant's lands for said year and all subsequent years thereafter up to and including the year 1924. (a) County courts are creatures of the statutes and have no jurisdiction except such as are delegated to it by the statute. Jefferson County v. Cowan, 54 Mo. 234; Eaton v. St. Charles County, 8 Mo. App. 177; Miller v. Woodward, 8 Mo. App. 167; Shell v. Lelan, 45 Mo. 289; Smith v. Haverath, 53 Mo. 88. (b) The county court being a creature of the statute with only such jurisdiction as the statute confers on it and there being no statute to warrant it to readjust and reassess the taxes, raising the amount from \$59 to \$115.56 for the year 1912 and succeeding years to and including 1924, its acts are void, even in a collateral attack, where the whole record, as in this case, shows the court to be without jurisdiction to act. (c) Article 4, chap. 122, R. S. 1899, is a separate scheme within itself for the drainage and reclamation of wet and overflowed lands and is not dependent upon any other portion of the statute.

(3) Respondent is an innocent purchaser without notice, so far as it relates to any raise in his taxes over and above the amount as assessed by the viewers and engineer in Drainage District No. 4 and confirmed by the county court by its approval and confirmation of the final report, and any attempted raise of said amount of taxes assessed against his land and confirmed as aforesaid, is void. *Meir v. Blume*, 80 Mo. 179; *Plow Co. v. Sullivan*, 158 Mo. 440; *Drey v. Doyles*, 99 Mo. 459.

GRAVES, J.—This case reaches us through a certification from the Springfield Court of Appeals, the grounds for such certification being that the record involves constitutional questions as well as a construction of revenue statutes. It is sufficient to say that constitutional questions were duly lodged in the answer. Judge STRUGIS for the Springfield Court of Appeals thus states the case:

“This is a suit for delinquent drainage ditch taxes assessed against land owned by defendant. The suit is brought in the name of the State at the relation of the Collector of the Revenue of Dunklin County, Missouri, for the use and benefit of Drainage District Number Four of that county. The record discloses that such drainage district is one formed under the supervision of the county court as provided by article 4, chapter 122, Revised Statutes 1899, which as amended in 1905, is now article 4, chapter 41 (Secs. 5578-5635), Revised Statutes 1909. The controversy is as to the amount of special taxes properly assessed against this land, the defendant conceding and offering to pay \$59, while plaintiff demands \$115.56. The amount defendant concedes and is offering to pay is the original (annual) assessment made or confirmed by the county court under section 8288, Revised Statutes 1899 (sec. 5588, R. S. 1909), and apportioned into installments under section 8300, Revised Statutes 1899 (Sec. 5601, R. S. 1909). It appears that the county court some five or six years after the drainage district was formed and the confirmation of the original assessments made by the viewers and en-

gineers appointed for that purpose undertook, by its order of April 29, 1912, to 'rearrange' and increase the amounts of the annual installments yet to fall due for the years 1912 to 1924 inclusive. The occasion for making this order, as we gather from the record, is that because of some error the county court issued and sold bonds to the amount of nearly \$56,000, but levied assessments against the lands within the district for an amount of only about \$36,000. The increased assessments are to cover this deficiency of some \$20,000, and provide a fund, otherwise insufficient to pay the bonds at maturity. It is agreed that if the county court has power and authority to make this order of April 29, 1912, increasing the annual assessments, then the amount demanded is due; otherwise, only the amount tendered is due. The defendant contends that the county court exhausted its power to make assessments in its order confirming the report of the viewers and engineers in connection with the formation of the district and could not at a later date make another order increasing the amounts then assessed.

"The defendant's answer contains these allegations: 'And defendant further answering says that plaintiff is attempting to collect from him a second assessment which was made without notice to defendant, and defendant says that the county court of Dunklin County had no authority to make such second assessment, as was done in this instance, inasmuch as such second assessment was made without any notice and made after the completion of the work to be done in said drainage district and was made without due process of law, and it constituted the taking of private property for public use without compensation in violation of the Federal and State Constitution, to-wit: Section 1 of the Fourteenth Amendment of the Constitution of the United States, and section 30 of article 2 of the Constitution of Missouri. Wherefore, defendant says that said second assessment or arrangement wherein his taxes were increased from \$59 to \$115.56, is null and

void, and of no effect and he asks judgment cancelling said order of the said county court for the reason that the same is null and void and without authority and in violation of both the Federal and State Constitution and that plaintiff may be compelled to accept the said sum of \$59, the original amount due under the original assessment made by the viewers and engineer in said drainage district and confirmed by the final order of the county court in approving the final report of the said viewers and engineer in said drainage district.' In this connection the record shows that no notice was given to the landowners as to the action of the county court in making this order of April 29, 1912, increasing the assessments. The plaintiff's contention is that the landowners were already in court for this purpose because of receiving notice of the original proceedings."

Such other matters as may be material can be noted in the course of the opinion. The foregoing outlines the case.

I. The question involved is single and plain. Whether easy of solution remains to be seen. The validity of the order of the county court of Dunklin County of date April 29, 1912, is the turning point in the case.

The surrounding facts are: The county court in fact approved of an amount of benefits as against the land involved herein, which, exclusive of interest, is more than sufficient to pay all previous amounts, and all assessments to be made under this order of April 29, 1912. However, at the time of the organization of the district, and whilst approving the report of the viewers, and approving the assessments of benefits aforesaid against the land in question, the county court approved and provided for annual assessments, which was discovered would not meet the bond issue which the court had directed to be issued. This bond issue was for \$55,977.77. They were sold for \$56,077.77, and that sum placed to the credit of the district. When the work had been done it was found that there was a surplus of

**Assessments
Less Than
Benefits.**

\$8,000 and this was used in the discharge of the obligations and accrued interest. Although the court directed the issuance of bonds in the sum of over \$55,000, as stated *supra*, it only approved and directed assessments against benefits in something over 36,000, leaving a difference between the bond issue and the provision for its payment of more than \$19,000.

This difference was reduced, by the application of the surplus aforesaid, to a little over \$15,000. In 1912 when the discrepancy between the bonded debt and this approved assessment was discovered, the order of April 29, 1912, for an increased assessment for the remaining years, was made at the instance of the bond-holders. Under the original assessment the amount due from respondents' land for 1912, was \$59, but under the order of April 29th, *supra*, it was \$115.56. The difference was the real amount in dispute, defendant having tendered the former sum, and kept his tender good by deposit.

Defendant was not the owner of the land in question at the organization of the district, but bought it afterward, and prior to the order of April 29th, *supra*. It is admitted that no notice was given to landowners prior to making this order of April 29th, but that the previous owner of the land involved was properly in court at the organization of the district, is not questioned. The trial court held that the defendant was not liable for more than the \$59, and that the order of April 29th, *supra*, was invalid. This view is reached from several angles, and these we take in order.

II. It is first contended that after the county court had made its original assessment against the lands of the district its power in the premises was fully exhausted, and no further exercise of the power to levy assessments could be valid. This on the theory that under the county court act there was no specific grant of power to make a second or additional assessment, even though the benefits found are in excess of the assessment

Power to
Make
Additional
Assessments.

made. Just how the discrepancy between the authorized bond issue and the first assessment of taxes made, occurred, does not clearly appear from the record. It does appear, however, that the reported benefits were some thousands more than the bond issue, and the directed assessments of taxes some \$19,000 less than the bond issue. If the county court exhausted its power, when it made the first assessment of taxes against the lands of this district, then we have an end to this controversy.

In 1913, the Legislature (Laws 1913, pp. 271 and 281) made specific provisions for additional levies of assessments, and from this it is argued that we have a legislative construction to the effect that no such power previously existed. If this contention be true it is at best only persuasive, rather than binding authority. We must go to the previous law, and from its context determine the powers of the county court. This drainage district was organized under article 4, chapter 122, Revised Statutes 1899, as amended by the Act of 1905. We will have to go to the said Act of 1905 for most of the law of this case, as it was in full effect at the organization of the district. This act repealed many sections of article 4, chapter 122, Revised Statutes 1899, and enacted new sections in lieu thereof. These new sections are the applicable law, and if they, when considered with the old sections, furnish no basis for a subsequent assessment of the lands in the district, defendant is right in his contention. That there is no express authority for such action is clear, and the real question is to determine whether or not the then law precludes a clear inference of such a power.

By section 8284 (Laws 1905, p. 182) it is provided that after the county court has determined that the improvement should be made, it then shall appoint an engineer and three viewers. These viewers are given specific duties to perform. Among other things to be done by this board, this section says:

“They shall also make and return a schedule of all lots and lands and of public and corporate roads or railroads that will be benefited, damaged or condemned by or for the improvement, and the damage or benefit to each tract of forty acres or less, and *make separate estimates of the cost of location and construction, and apportion the same to each tract in proportion to the benefits or damages that may result to each.*”

In the same act, section 8286 reads:

“The viewers shall have the power to condemn the right of way for the ditch or other improvement; and when damages are allowed persons, their benefits, if benefited, shall be taken into consideration, and their assessments for benefits shall be reduced by the amount of their damages; and if not benefited they shall be allowed and paid compensation for their damages.”

At first blush one might be impressed with the view that assessments for benefits should be the same as the taxes levied by the county court, but we are inclined to the idea that this section has reference solely to condemnation of lands and the adjustment of damages therefor. This, because of other sections which follow, as well as those which precede it. Thus in section 8284, these viewers are required to apportion the cost of location and construction in proportion to the benefits found, but not necessarily up to the benefits found. In other words, they might find that a certain tract would be benefited \$800, but further find that its due proportion of the cost of location and construction would be only \$400.

Section 8287 of said act provides that upon the incoming of the report of the viewers, which report must give the part of the cost actually apportioned against each tract of land, the court shall set the same down for hearing and give notice of such hearing.

In the instant case twenty-year bonds were to be issued, and the apportioned cost of construction would cover a period of twenty years. This cost to the land involved here was an annual payment of \$59 for the

twenty years, which was raised by the subsequent order to more than \$115 per year.

Now it must be noted that the landowners, under the statute, *supra*, were entitled to a hearing upon the amount of benefits assessed against their lands, as well as the amount of the proportionate cost of construction to be charged against that land. The law provides for but one time for such a hearing, and that is prior to the approval by the county court of the viewers' report. Passing now from a consideration of said section 8287, we come in order to 8288 (Laws 1905, p. 184) which reads:

"The court shall first determine whether the required notice has been given. If it finds that due notice has not been given, it shall continue the hearing to a day to be fixed by the court, and cause the notice to be given as provided in section 8287; and when the court finds that due notice has been given, *it shall examine the report of the engineer and viewers, and if it appears to the court that the estimates of the cost of location and construction and of damages and benefits to each tract are correct, and that the apportionment of the cost of location and construction, is, in proportion to the benefits and damages to each tract, in all things fair and just*, it shall approve and confirm the same; if, however, the county court shall find that the apportionments reported by the engineer and viewers are unfair or unjust, and, as made, ought not to be confirmed, it may, by an order of record, amend the report upon the evidence so as to make the apportionments fair and just in proportion to the benefits or damages; if the county court shall find that the location or specification of the ditch or other improvement should be changed it may by an order of record change such location and dimensions, provided that, before the county court shall change the location reported by the viewers, the parties interested shall convey or cause to be conveyed to the drainage district, a right of way for the ditch or other

improvement upon the route selected by the county court.”

The italics here, as elsewhere in the quotation of these statutes, are ours.

This section again emphasizes the fact that the apportionment of the cost of construction to the several tracts of land is one primarily for the viewers, but thereafter to be confirmed by the court, or modified and then confirmed by the court. Following the same thought, i. e., that the apportionment of the cost of construction, as made by the viewers, is a matter for court determination when the report is up for consideration, after notice given, we find this language used in section 8292 (Laws 1905, p. 185):

“Any person whose lands are affected by the proposed improvements may, on or before the day set for the hearing by the court, *file exceptions to the apportionments made by*, and to the action of, the viewers upon any claim for compensation or damages. The county court may hear testimony and examine witnesses upon all questions made by such exceptions, and for that purpose may compel the attendance of persons as witnesses and the production of other evidence, and its decision upon each of the exceptions shall be entered of record.”

Note the language. The landowner must file exceptions to the apportionments made. These exceptions must be tried out by the court, and if the report of the viewers is sustained, it is a final judgment as to the landowner, unless he appeals therefrom and reverses the action of the county court. The question then arises, if it is afterward found that by this final judgment the amount is too small, is it not still a finality so far as the landowner is concerned? We think so. Both parties have had their day in court. Judgment has been rendered, and there is no provision in the law for a re-assessment of these costs of construction. By the Act of 1913, the Legislature recognized that further authority was necessary for a re-assessment, and amended

the law, but that act cannot be made retroactive, and applied to this case.

The Act of 1905 contemplated but one action by the county court. It, of course, contemplated that the charges against all the tracts in the district would pay off the bonds issued, but it further contemplated that all this would be done at the hearing provided for by the law, and not by future orders of the court. It contemplated that the final judgment approving the report would have the apportionments against the lands equal to the cost of construction, but from this it does not follow that after a different final judgment is entered, power is left in the court to correct it four or five years later. Absent a statute authorizing later action by the court (and there is none) this action of the county court was *coram non judice*, and void. Whether equity might reach the case, we do not consider in this, a law case. It may be that the Act of 1913 was the outgrowth of this case, but from any angle it is unavailing here. All through the Act of 1905 runs the idea that the viewers must first act as to the assessment of the costs of construction as against each tract of land. [Vide Sec. 8298, Laws 1905, p. 187.]

The payment of the bonds issued is limited to the proceeds of these assessments of cost of construction. If they pay the bonds, well and good, but if they do not, there is no further recourse under this Act of 1905, under which this district was organized. Of this Act of 1905, sections 8301 and 8301a read:

"Sec. 8301. The said assessments, after the confirmation by the county court as herein provided, together with the interest thereon, as so fixed by the court, shall be entered by the county clerk, in a special book, to be known as the ditch assessment book, which shall be provided by him at the expense of the county, and annually thereafter, until such assessment and the interest thereon shall be fully paid, the county clerk shall enter, opposite each tract of land, upon a ditch tax book in columns to be provided for that purpose, the amount

of the installment of such assessments for such year, and the interest for such year on all unpaid installments not past due, as fixed by the county court as herein provided; the said installments of said assessments and the interest thereon shall be applied to the payment of the bonds, principal and interest, issued pursuant to this article, and, except as herein provided, to no other purpose, *and the payment of such bonds shall be thus secured.*

"Section 8301a. The county court may, if prayed for in the petition, issue bonds in denominations of not less than one hundred dollars, and sell the same to meet the expenses of locating and constructing any ditch or improvement under the provisions of this article, which bonds shall mature, at annual intervals, commencing after a period of two years, for not exceeding twenty years, bear interest at not to exceed six per cent per annum and be payable semi-annually at the office of the county treasurer. Such bonds shall be sold by the county treasurer, without expense to the county, to the highest and best bidder, after the county court shall have fixed the time and place of such sale, and given notice thereof, by publication, in some weekly newspaper published in the county, but in no case shall any such bond be sold for less than par: *Provided, such bonds shall show upon their face the purpose for which they are issued and shall be payable out of moneys derived from such assessments and none other.*" Again the italics are ours.

But reverting to section 8301, for another thought, it clearly appears therefrom that the lawmaker only contemplated the one action by the county court. This section only leaves (after the confirmation judgment of the county court has been entered) simple ministerial duties for the county clerk. It contemplates no further action by the court, nor do we find in the statutes governing drainage districts organized by the county court, under this article 4 of chapter 122, Revised Statutes 1899, and the Act of 1905, any power or

right to reassess the lands with the costs of improvements, until the Act of 1913. County courts are of limited jurisdiction, and their powers must be gathered from the law. We find no law for the action of the county court in 1912, and it must fall.

III. We are cited to State ex rel. v. Wilson, 216 Mo. l. c. 282, as authority for the action of the county court in this case. The ruling there is not applicable here. We were then discussing a township drainage district, organized under article 5 of chapter 122, Revised Statutes 1899. The district in question here was organized under article 4, chapter 122, Revised Statutes 1899, as amended by Acts of 1905. In article 5, chapter 122, Revised Statutes 1899, we had section 8337 which gave the county court express authority for supplemental assessments and it was upon this express statute, that we sustained the supplemental assessment without notice, because the statute so read.

We are also cited to the case of State ex rel. v. Bates et al., 235 Mo. 262. That case does not discuss the statutes we have here under consideration. That drainage district was organized under article 7 of chapter 122, Revised Statutes 1899. That article also had section 8369, which provided for an additional assessment. State ex rel. v. Young, 255 Mo. l. c. 635, is also cited. The drainage district there involved was one organized under article 5, chapter 122, Revised Statutes 1899, and what we have said of State ex rel. v. Wilson, supra, applies to this case. It is not in point as subsequent assessments are specifically provided for in said article. Under that law the jurisdiction of the county court was expressly given. Not so in the case at bar. Barnes v. Construction Co., 257 Mo. l. c. 195, is cited, but it does not reach the question here.

We have been cited to no case in Missouri holding that under article 4 of chapter 122, Revised Statutes 1899, as amended by Acts of 1905, the county court has

Kippenbrock v. Railroad.

any power to take any step towards a second assessment. The Legislature so recognized this absence of power by granting the same by the Act of 1913. Because other articles contained express power to the county court to make such subsequent assessments, does not help the plaintiff in this case. The right to make this subsequent assessment must be sought from the express provisions of the law under which the drainage district was organized. That law conferred no such power upon the county court, and its order of April 29, 1912, was void.

The judgment *nisi* was correct and is affirmed. All concur.

O. A. KIPPENBROCK v. WABASH RAILROAD
COMPANY, Appellant.

Division One, March 30, 1917.

1. **NEGLIGENCE: Notice of Dangerous Situation: Crossing Tracks Necessary.** Having constructed its yard office a few feet south of the main track and necessarily making up its freight trains north of the main track, and it being necessary for conductors to obtain their orders and waybills from the yard office, the railway company was bound to know these employees must cross the main line in order to reach their trains about to be taken out. This was notice that such employees were likely to be upon or near the track next to the office.
2. ———: ———: ———: **Running Train Without Warning or Headlight in Night Time.** And in these circumstances, and there being no particular point used or recognized as a crossing, it was negligence to run an overdue passenger train past the yard office, on the main line, on a dark night, through an unlighted yard, at a speed of thirty or thirty-five miles an hour, without sounding the bell or whistle, and without a headlight burning, particularly when the register in the office indicated the train had already passed, as was observed by the plaintiff freight conductor, who, having received his orders and waybills, had left the office and was proceeding to his freight train along the main line, when suddenly apprehending his danger he leaped back, struck the office building and "rebounded" against the train.

Kippenbrock v. Railroad.

3. ———: **Headlight.** A headlight is a common and necessary means adopted by all railroads for the protection alike of those rightfully on the train, or on the track, or approaching it, in the night time, and to rapidly run a train through railroad yards in the night time without such headlight is negligence.
4. ———: **Lookout for Employees.** The rule that a railroad company is under no obligation to keep a lookout for employees who are aware of what is going on and are required to guard themselves from injuries naturally to be expected, has no application to an act or movement which is of unusual character and the unusualness of which reasonably may deprive the employee of an opportunity to protect himself.
5. ———: **Contributory: Crossing Track by Shortest Course.** The fact that the freight conductor on his way from the yard office across the main line to take his train, did not cross it directly, was at most evidence of contributory negligence, which is not a bar to an action for damages under the Federal Employers' Liability Act.
6. ———: **Instruction: Should.** The use of the word should, used in an instruction in which the jury are told that, if they find certain facts, they "should" return a verdict for plaintiff, is not objectionable. It imports duty or obligation; and is therefore appropriate to advise the jury of their duty.
7. ———: ———: **Contributory Negligence as Diminution of Damages: In Language of Statute.** In an action brought under the Federal Employers' Liability Act, an instruction telling the jury, if they find certain facts, to return a verdict for plaintiff, "even if if you should find him guilty of negligence contributing to the injury, but in that event the damages should be diminished by you in proportion to the amount of negligence attributable to plaintiff," using the language of the statute, uses a formula that is exempt from criticism. But whether an instruction explaining the statutory language should have been given, is not decided, because none such was asked, and the question is not in the record.

Appeal from Randolph Circuit Court.—*Hon. A. H. Waller*, Judge.

AFFIRMED.

J. L. Minnis, N. S. Brown and D. H. Robertson for appellant.

(1) The trial court erred in refusing to give defendant's instructions in the nature of demurrers to the evidence, at the close of plaintiff's case and

Kippenbrock v. Railroad.

again at the close of all the evidence, because: (a) there was a total failure to prove the charges of negligence alleged in the petition; (b) there was a failure to prove any duty of the defendant to have the headlight on the engine burning, or to warn the plaintiff by sounding the whistle or ringing the bell; and (c) there was a total failure of proof that the speed of the passenger train was excessive. *Kelly v. Benas*, 217 Mo. 9; *Hufft v. Railroad*, 222 Mo. 286; *Gabal v. Railroad*, 251 Mo. 257; *Rashall v. Railroad*, 249 Mo. 509; *Cahill v. Railroad*, 205 Mo. 393; *Riccio v. Railroad*, 189 Mass. 358; *Clancy v. Transit Co.*, 192 Mo. 615; *McGrath v. Transit Co.*, 197 Mo. 98. (d) It was not negligence *per se* for defendant to run its passenger train without a headlight or to fail to ring the bell or sound the whistle, because such failures were not shown to be in violation of any duty created by statute or ordinance. 8 *Thompson (White Supp.)*, sec. 10. (2) Plaintiff was guilty of contributory negligence and his negligence was the sole cause of his injuries. (3) The court erred in giving plaintiff's instructions numbered one and four. Sec. 3, Federal Employers' Liability Act; *Railroad v. Earnest*, 229 U. S. 122; *Railroad v. Tilghman*, 237 U. S. 499; *Railroad v. Banks*, 156 Ky. 609; *Railroad v. Holloway*, 163 Ky. 125; *Cross v. Railroad*, 191 Mo. App. 202.

M. J. Lilly and O. C. Phillips for respondent.

(1) The testimony showed negligence on the part of defendant. *Tetwiler v. Railroad*, 242 Mo. 187; *Cotner v. Railroad*, 220 Mo. 285; *Becks v. Mo. Pac. Ry. Co.*, 102 Mo. 551; *Morrow v. Railroad*, 147 N. C. 623, 16 L. R. A. (N. S.) 642; *Gorton v. Harmon*, 152 Mich. 473; 8 *Thompson (White Supp.)*, Negligence, sec. 1548; *Railroad v. Masley*, 60 Fla. 186. (2) There was no error in the instruction in the measure of damages. *Railroad v. Ernest*, 229 U. S. 114. Appellant cannot complain of the instructions, having failed to ask one instructing more fully. *Bank v. Ragsdale*, 171 Mo.

168; Wheeler v. Bowles, 163 Mo. 398; Ferber v. Railroad, 139 Mo. 285; Wahl v. Transit Co., 203 Mo. 276; King v. St. Louis, 250 Mo. 501.

BLAIR, J.—In the Randolph Circuit Court respondent, a freight conductor in appellant's service, recovered judgment for damages for injuries he received when struck by one of appellant's trains in the yards at Moberly. Moberly is a division point. The yard office is a few feet south of the main line; and a double lead on which two or three switch engines were working at the time respondent was injured, is just north of the main line. About midnight respondent was called for duty. He was to take out a freight train composed of cars destined to points outside the State. His train was made up in the yards on a track north and west of the yard office, which office is south of all the tracks. One of appellant's passenger trains due from the west at 2:50 a. m. was late. Respondent went to the yard office, procured his waybills and orders, and left the office on his way to his train. It was necessary for him and all other freight conductors to cross the main track, after leaving the office, in order to get to trains to which they were assigned. The distance of the yard office from the south rail of the main line is estimated by the witnesses to be from four to six feet. There is evidence tending to show that it was known to be customary for conductors to look over the train register and that respondent did this; that this register indicated that the train which struck respondent was already in; that respondent procured his waybills and orders and went out the east door of the yard office, thence to the north side thereof, and, according to the engineer on the passenger train, was walking westward in the space between the office and the main track when he suddenly discovered appellant's train almost upon him; that he leaped back, struck the building and "rebounded" against the train and was injured. There is also evidence that he had walked, in the space indi-

Kippenbrock v. Railroad.

cated, toward the west end of the yard office, and then stepped out upon the main track and proceeded west a few steps further, and then was struck; that this course in going to his train was more convenient and safer than to go directly across the main track; that there was a space six or eight feet wide between the main line and the lead track next north of it, and the employees walked along this space in which there was a pathway; there is no evidence this pathway crossed the main line or was generally used by trainmen in going from the yard office to their trains. There was evidence the main track west from the yard office was straight for a half mile or more, and that an electric headlight, such as was on the engine of the passenger train, could be seen two miles away; that the train which struck respondent was running thirty or thirty-five miles an hour; that it gave no signals, either by bell or whistle, and that the headlight was not burning and that it reached the yard office before those inside were aware of its approach; that the night was dark, and the testimony warrants an inference that no other lights on the train were visible to one as nearly in front of it as was respondent, and that the yard, west of the office, was unlighted. There is no dispute as to respondent's injury nor as to the train which injured him.

I. Having constructed its yard office next the main track and south of it and necessarily making up its freight trains north of the main track, and it being necessary for conductors to procure their orders and waybills from the yard office, appellant was bound to know these employees must cross the main line in order to reach their trains. This was notice that such employees were likely to be upon or near the track near the yard office. There was no evidence any particular point was used or recognized as a crossing. In the circumstances it was negligence to run an overdue passenger train past the yard office on a dark night, through an unlighted yard, at a speed of thirty or

**Negligence
Toward
Employee.**

thirty-five miles per hour, without sounding bell or whistle and without a headlight burning, particularly when the train register in the office, as observed by respondent, indicated such train had already passed. A headlight is "a common and necessary means adopted by all railroad companies for the protection alike of those rightfully on the train, and on the track, or approaching it in the night time. No engine is constructed without such a light, and no train is run in the night time by any railroad company under any ordinary circumstances without having it lighted. This is a fact known to all reasonable minds by common experience, and the court committed no error in declaring that it was negligence if defendant's servants failed to have such light lighted and burning at the time of the collision." [Becke v. Ry. Co., 102 Mo. l. c. 552; Gorton v. Harmon, 152 Mich. l. c. 476; Burling v. Railway, 85 Ill. l. c. 20; B. & O. S. W. Ry. v. Alsop, 176 Ill. l. c. 475; Collins v. Railroad, 30 Minn. l. c. 33; Railway v. O'Hara, 150 Ill. l. c. 585; Willis v. Railroad, 122 N. C. l. c. 909; Railroad v. McNicholas, 98 Ill. App. l. c. 58; Artz v. Railroad, 44 Iowa, 284.]

It is contended respondent was an employee and there was no obligation to keep a lookout for him. Galbal v. Railroad, 251 Mo. l. c. 267 et seq., and like cases are relied on. The principle announced in those cases has no application to this. That principle is founded upon the idea that employees falling within it are aware of what is going on and are expected, ordinarily, to guard themselves from injury from the transaction of the company's business in the usual manner. In those cases the ability of the employee to protect himself and the rule that he must do so depend upon the fact that the movement which caused the injury was one naturally to be expected. It is not held in any of those decisions that an act or movement which is of unusual character and the unusualness of which reasonably may be found to have deprived the employee of an opportunity to protect himself, is nevertheless one from which

Klippenbrock v. Railroad.

he must protect himself at his peril. The rule invoked has not been applied to facts like those in this case, and we do not think it applicable. The doctrine is usually carefully limited and qualified and respondent does not fall within its scope. [Gabal v. Railroad, *supra*; Colasurdo v. Railroad, 180 Fed. l. c. 835; Hardwick v. Railroad, 181 Mo. App. l. c. 166 et seq; Schulz v. Railway, 57 Minn. l. c. 273.] The fact respondent did not walk directly across the main line does not, of itself, defeat the action. It was evidence, at most, of contributory negligence, which is not a bar in an action under the Federal Employers' Liability Act under which this case was tried.

II. This action is under the Federal Employers' Liability Act. Respondent's first instruction required the jury, if they found certain facts they should return a verdict for respondent; and added: "and if you so find your verdict should be for the plaintiff, even if you should find him guilty of negligence contributing to the injury, but in that event the damages should be diminished by you in proportion to the amount of negligence attributable to plaintiff."

**Instruction:
Contributory
Negligence.**

The language of the act (Sec. 3) is that "contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributed to such employee."

(a) The word "should" as used in the instruction imports duty, obligation; and, therefore, the objection to its use is not well founded. It is a word used with frequency in instructions to advise the jury that it is their duty as jurors to find as stated. The objection is quite technical and is untenable. [State v. Connor, 74 Kan. 898; People v. Barkas, 255 Ill. l. c. 526; Lynch v. Bates, 139 Ind. l. c. 210, 211; Smith v. State, 142 Ind. l. c. 293; Durand v. Railroad, 65 N. J. L. l. c. 660, 661.]

(b) The language of the quoted clause, except as pointed out under (a), is the language of the statute.

In *Norfolk & Western Ry. v. Earnest*, 229 U. S. 1. c. 120 et seq., the Supreme Court of the United States considered an instruction, the relevant part of which is: "the Act of Congress provides that contributory negligence is not to defeat a recovery altogether, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee the negligence of the plaintiff is not a bar to a recovery, but it goes by way of diminution of damages in proportion to his negligence as compared with the negligence of the defendant." The court said: "The thought which the instruction expressed and made plain was that, if the plaintiff had contributed to his injury by his own negligence, the diminution in the damages should be in proportion to the amount of his negligence. This was twice said, each time in terms readily understood. But for the use in the second instance of the additional words 'as compared with the negligence of the defendant' there would be no room for criticism." The objectionable language is not found in respondent's instruction in this case. In that case the court held that "the statutory direction that the diminution shall be 'in proportion to the amount of negligence attributable to such employee' means, and can only mean, that, where the casual negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both." The instruction in this case follows the act, and the decision cited holds such a formula to be exempt from criticism. Whether an instruction explaining the statutory language, in accordance with the holding in the *Earnest* case, ought to have been given had appellant asked it, is not a question the record presents.

We find no reversible error. The judgment is affirmed. All concur, *Bond, P. J.*, in paragraph one and in result.

FIDELITY TRUST COMPANY, Plaintiff in Error,
v. MEXICO, SANTA FE & PERRY TRACTION
COMPANY.

Division One, March 30, 1917.

1. **WRIT OF ERROR: New Suit.** A writ of error is not, like an appeal, to be considered as a continuation of the original action, but as a new action, which must contain, on its face, the evidence of the right of the plaintiff in error to a review.
2. ———: **Specification of Parties.** Although the writ of error is a writ of right, that right differs in no respect from the absolute right to bring an action under the Code of Civil Procedure, which can only be done by petition, specifying, among other things, the names of the parties to the action. So in the writ of error, the plaintiff must be equally explicit as to the identity of the judgment he attacks and those against whom he seeks a remedy.
3. ———: ———: **Real Party Not Named.** If neither the name of the party with whom alone is the controversy, nor his judgment by any title which identifies it, is mentioned in the writ, and he does not come within any description contained in it by which he can be identified as the adversary of the plaintiff in error, the writ must be quashed.

Error to Audrain Circuit Court.—*Hon. James D. Barnett*, Judge.

WRIT QUASHED.

E. W. Hinton and *David H. Robertson* for J. S. Brown, Trustee, Intervenor.

(1) The writ of error is insufficient to bring any record before this court, and especially the record in the intervening or branch case between Brown, Trustee, as claimant, and Fidelity Trust Company, which is apparently the record sought to be reviewed; the writ wholly fails to name the parties to the cause below, and is fatally defective. *Miller v. McKenzie*, 10 Wall. 582; *Davenport v. Fletcher*, 16 How. 142-143; *Smythe v. Strader, Pevine & Co.*, 12 How. 327. Hence, the court

cannot take jurisdiction. A writ of error is the beginning of a new suit. *Macklin v. Allenberg*, 100 Mo. 337. It operates to remove the record of the cause below to the appellate court, and it is therefore jurisdictional that the cause below be described by naming all the parties. *St. Louis v. Theatre Co.*, 201 Mo. 396. (2) The notice must advise what judgment, the parties to the judgment, and the cause in which given, which is sought to be reviewed by writ of error. 3 *Corpus Juris*, pp. 1211 and 1212; *Drug Co. v. Hill*, 61 Mo. App. 680.

Clarence A. Barnes, Justin D. Bowersock and Robert B. Fizzell for plaintiff in error.

(1) The defendant in error, J. S. Brown, Trustee, contends that the writ of error issued in this cause should be quashed because the writ does not set out the names of all the parties in the court below. An examination of the statute and practice governing writs of error in this State shows that this was not necessary. Sec. 2054, R. S. 1909. Our statute does not prescribe the form of the writ or its contents, nor does it provide that the writ shall be served on the adverse parties, as was the rule at common law. Instead of this, it provides (Sec. 2071) for the giving of notice of the suing out of the writ to the adverse parties. As to the writ itself, the statute leaves it as a matter solely between the clerk of this court and the court below. It is the duty of the clerk of this court to describe the action below sufficiently to enable the lower court to certify up the record in the proper case. It is the duty of the lower court to certify up the record in the case described in the writ, and in no other case. In the present case both of these duties were fulfilled. The defendant in error contends that the designation "et al." in the writ was meaningless, although it is a term universally employed by bench and bar and was used in the present case in the journal entries in the court below. *Cowhick v. Jackson*, 161 Mo. App. 459; *State ex rel. v. Mining Co.*, 169 Mo. App. 79. The

Trust Co. v. Traction Co.

defendant in error has cited several old cases in the United States Supreme Court to support his contention that the writ of error should name all of the parties in detail. These cases were not only decided at a time when a writ of error was a technical remedy, and not a statutory mode of review as in this State, but they were decided in view of the common law principle which required that the writ be served on the adverse party, and under which the writ itself was the sole notice to the adverse party that such writ had been issued. If the writ was not so served, it would be dismissed. *Washington County v. Durant*, 7 Wall. 694; *Wood v. Lide*, 4 Cranch, 180. If the writ itself is served upon the adverse party, and if it constitutes the sole notice to him of its issuance, necessarily it must be more complete than in this State where it is purely a matter between this court and the lower court, and where a separate notice of the issuance of the writ is prescribed by the statute. The form of the writ in the case at bar was specifically approved by this court in a dictum in the case of *St. Louis v. Butler*, 201 Mo. 396. See also *Gulf Line Ry. Co. v. Way*, 137 Ga. 109. (2) The defendant in error, J. S. Brown, Trustee, contends that the notice served upon him of the issuance of the writ of error in this cause, was insufficient. An examination of the notice in view of the statutory requirements concerning it proves its sufficiency. Sec. 2071, R. S. 1909. The notice in the present case contains the names of every party to the writ. The Fidelity Trust Company, a plaintiff below, is the sole plaintiff in error, and every other party below, except the co-plaintiffs who refused to join in the writ, is named as a defendant in error. The notice is addressed to all of the defendants in error or their attorneys of record as the statute permits. It is true that the notice does not set out in detail all of the parties in the lower court in describing the action below. The statute does not require that it should. It is the suit in this court of which the defendants in error should be advised, not of the suit below. The rule

adopted by the courts of appeals in determining the sufficiency of the notice is whether on a fair and reasonable interpretation it informs the respondent that an appeal has been taken. *Coal Co. v. Mo. Pac. Ry. Co.*, 48 Mo. App. 578; *Munroe v. Herrington*, 99 Mo. App. 288; *Igo v. Bradford*, 110 Mo. App. 670; *Teasdale & Co. v. Produce Co.*, 120 Mo. App. 584; *Swift & Co. v. Baldwin*, 185 S. W. 551.

BROWN, C.—This controversy is here upon writ of error to the circuit court for Audrain County, and the question of the sufficiency of the writ stands at the door of its consideration. It is as follows, omitting the attestation which is regular:

The State of Missouri, ss.

The State of Missouri, To the Judge of the Eleventh Judicial Circuit in said State, Greeting:

Whereas in the record and proceedings in a certain cause lately pending in the Circuit Court of Audrain County, wherein J. D. Bates et al. were plaintiffs, and Mexico, Santa Fe & Perry Traction Company et al. were defendants in a civil action, manifest error hath intervened to the great damage of the said Fidelity Trust Company, one of the above plaintiffs, as by its complaint we are informed.

Now we being willing that the error, if any there be, should be corrected, and full and speedy justice done to the parties aforesaid, in that behalf command you that you send to us, certified under your seal a perfect transcript of the record and proceedings in the cause aforesaid, or in lieu of such transcript, a certified copy of the record entry of the judgment order or decree, showing the term and day of the term, month and year upon which the same shall have been rendered, as the plaintiff in error shall direct, as fully as the same remain of record before you in said court, so that we may have them before us at our Supreme Court, to be begun and held at the City of Jefferson, in the County of Cole in said State, on the second Tuesday in October, next, so that our Judges of our Supreme Court on inspecting the record and proceedings aforesaid, may cause to be further done therein, for correcting the error, what of right and according to law ought to be done, and have you then and there this writ.

Prior to its issuance the Fidelity Trust Company requested J. D. Bates, W. W. Mundy, L. E. Botts, J. A. Botts, J. S. Brown, D. B. Guthrie, J. P. Cauthorn,

Trust Co. v. Traction Co.

C. C. Heizer and W. W. Botts to join with it in the application for the writ, all of whom refused to do so.

After the issuance of the writ, and more than twenty days before the return day named in it, the said Fidelity Trust Company caused a notice in writing of its issuance to be served on the following persons and corporations: Mexico, Santa Fe and Perry Traction Company; W. W. Botts, receiver of said company, J. S. Brown, trustee; S. L. Robertson, Mathias Crum, Butler Manufacturing Company, Bates Machine Company, Coatsworth Lumber Company and Crane Company. This notice concludes as follows: "The plaintiff in error, Fidelity Trust Company, was one of the plaintiffs in case, J. D. Bates et al. v. Mexico, Santa Fe & Perry Traction Company et al., the other plaintiffs refused to join in the writ of error. The return day of such writ of error is the first day of the Oct. term, 1914, of the Supreme Court, the same being Tuesday, October 13, 1914."

The transcript which constitutes the return to the writ is entitled as follows: "J. D. Bates et al., plaintiffs, v. Mexico, Santa Fe and Perry Traction Company et al., defendants," while the original petition which constitutes its first entry is entitled as follows: "J. D. Bates, W. W. Mundy, L. E. Botts, J. A. Botts, J. S. Brown, D. B. Guthrie, J. P. Cauthorn, C. C. Heizer and W. W. Botts, plaintiffs, v. Mexico, Santa Fe and Perry Traction Company, a corporation, and Fidelity Trust Company of Kansas City, a corporation, defendants." The petition was filed in the Audrain Circuit Court, January 28, 1913, and alleged that the plaintiffs owned a total of 137 bonds of the Traction Company (each in the sum of \$250, or a total of \$34,250); that the interest thereon was in default; that the Traction Company was insolvent; that the company's property was in danger of being lost; and asked that a receiver be appointed to administer it, and that the deed of trust to the Fidelity Trust Company, trustee, be foreclosed. It also stated, in substance, that the Fruin-

Bambrick Construction Company had a judgment against the Traction Company for the sum of \$47,900.47, and that great doubt existed as to whether or not it constituted a lien superior to that of the bonds on the property of the Traction Company, and asked that the receiver take immediate charge of the property, and for its sale and for the adjudication of the priority of the several liens.

A receiver was appointed on March 3, 1913, and on the 28th day of the same month the Fidelity Trust Company filed its answer setting out that by the provisions of the deed of trust it had the exclusive right to institute and maintain the foreclosure suit and asking that it be discharged as a defendant, which was done. In the meantime intervening petitions were filed by parties claiming small construction liens upon the railway company, and who are with the exception of J. S. Brown, Trustee, the same parties who were notified of the issuance of the writ of error.

On April 21, 1913, the court entered its decree foreclosing the deed of trust, and ordering the sale of the property by the receiver, free and clear of encumbrances; and that the money raised from such sale should not be distributed until the court should determine whether the lien of the Construction Company was prior to that created by the deed of trust. The sale was made on May 17, 1913, from which the sum of \$37,500 was realized. On the 28th of the same month the Construction Company, through one Marshall Rust, assigned its judgment to J. S. Brown, Trustee, whose connection with the litigation in that capacity then began.

On June 2, 1913, he filed as such trustee an intervening petition setting up his ownership of the judgment of the Fruin-Bambrick Construction Company, and claiming thereunder a lien on the proceeds of the receiver's sale prior to the lien of the deed of trust. The Fidelity Company answered, setting up its claim under the deed of trust to the entire proceeds of the sale. The

Trust Co. v. Traction Co.

intervenor replied, and the issue was tried by the court. The entire record in the original cause was introduced, together with much other evidence. The court found that there was in the hands of a receiver \$37,500, which, after payment of certain costs, including attorneys' fees, and not including the costs of the intervenor, which were taxed against the Fidelity Trust Company, was to be prorated among J. S. Brown, Trustee, as assignee of the Fruin-Bambrick Construction Company, the Crane Company, the Coatsworth Lumber Company, the Butler Manufacturing Company and Bates Machine Company, so that each should receive the same per cent of his claim out of the fund. From this judgment an appeal was asked by the plaintiff in error and granted, and leave given to file a bill of exceptions, which is the same bill of exceptions returned with this writ of error. Should it be necessary to refer further to the record we will do so in the opinion.

One J. S. Brown, Trustee, an intervenor upon the record filed as a return to this writ of error, has moved that the writ be quashed for the reason that it is wholly insufficient in law in failing to name or describe the parties to the record below or in this court.

The facts-before us are as follows: Suit was
Writ of Error. instituted by one J. D. Bates and eight other individuals claiming to be holders of bonds secured by deed of trust of the Mexico, Santa Fe & Perry Traction Company, a corporation, against that corporation and the Fidelity Trust Company, the trustee in the deed of trust, to foreclose that instrument and have a receiver *pendente lite*. The Trust Company answered that by the terms of the deed of trust it was the only party entitled to foreclose, and on its own application the court "discharged" it as defendant, and permitted it to proceed as a plaintiff, and the cause thereafter proceeded upon the record by the designation of J. D. Bates *et al.*, appellants, v. Mexico, Santa Fe & Perry Traction Company *et al.*, defendants. This is the title as it appears both in the writ of error and the

return thereto. The cause proceeded in this way to final judgment of foreclosure on April 21, 1913, under which the property was sold May 17th and was purchased by J. D. Bates, Trustee, for \$37,500, which in the hands of the receiver then became the bone of contention. After the sale J. S. Brown, as trustee for himself and others, purchased the Fruin-Bambrick judgment mentioned in the foregoing statement and intervened with a claim for the money in his capacity as trustee. The priority of a number of other intervenors who had established small liens upon the property was recognized in the decree of foreclosure, but we cannot gather from the record that their right is questioned. Around the intervention of J. S. Brown, Trustee, the sole controversy gathered and the Trust Company has thus far indicated no other object in the prosecution of this writ than to dispute his priority.

The application for this writ is not before us. Although the common law procedure in such cases required a *praecipe* containing the names of the parties and the nature of the judgment, we will assume, without determining its necessity, that it was filed and that it contained all the facts that appear upon the face of the writ, and determine its validity.

It is the settled doctrine of this court that a writ of error is not, like an appeal, to be considered as a continuation of the original action, but as a new action which must contain, on its face, the evidence of the right of the plaintiff in error to a review. [St. Louis v. Butler, 201 Mo. 396.] Although it is a writ of right, that right differs in no respect from the absolute right to bring an action under the Code of Civil Procedure, which can only be done by petition specifying, among others things, the names of the parties to the action, plaintiffs and defendants. These may not be left to be gathered by general averments showing whom the plaintiff might have sued had he so desired. So in this proceeding the plaintiff must be equally explicit as to the identity of the judgment he attacks and those against

whom he seeks the remedy. There are many plaintiffs in this case beside the plaintiff in error, but none of them had any fault to find with the judgment, and would not proceed with him against it, so that Bates, the only plaintiff named in the title to the cause, had nothing to do with this proceeding. There were two defendants included in the title—the Traction Company, against whom the foreclosure was sought, and this plaintiff in error, who afterward had itself transferred to the other side. It evidently has no controversy with the Traction Company, so that the title to the case, as it appears in the writ, contains no hint as to the identity of the real defendant in error. So far as this proceeding goes the plaintiff in error was, at the time the decree of foreclosure was entered, the sole plaintiff, and the Traction Company the sole defendant. The Construction Company had taken no steps upon the record to become a party. After the sale, Brown, Trustee, as its representative by assignment, intervened with a claim for the proceeds and won. The controversy is with Brown, Trustee, and with him alone, and yet neither his judgment nor his name is mentioned in the writ, nor does he come within any description contained in it by which he can be identified as the adversary of the plaintiff in error.

The writ should show on its face the name or some equivalent description of the one against whom it is directed, and such description as will identify the judgment upon which error is intended to be assigned. For insufficiency in these respects the writ is quashed and the proceeding dismissed.

Railey, C., concurs.

PER CURIAM:—The foregoing opinion of BROWN, C., is adopted as the opinion of the court. All the judges concur; *Bond, J.*, in result.

JACOB K. SHACKLETT, Appellant, v. SHERMAN CUMMINS.

Division One, March 30, 1917.

LEASE: Parol Agreement: Part Performance: Possession. The retention of possession of land by a lessee after the expiration of his written lease, under a parol contract made by the landlord, while he was yet in possession, to lease to him for another year, will take the case out of the Statute of Frauds and authorize compulsory specific performance, only when such retention of possession is pursuant to and referable solely to the parol contract. Mere continuance of possession does not constitute part performance. Hence the expression by the Court of Appeals, in *Winter v. Spradling*, 163 Mo. App. 77, that "there would be nothing inconsistent in the defendant [tenant] holding possession under both the written and verbal leases at the same time," is condemned.

Appeal from Sullivan Circuit Court.—*Hon. Fred Lamb*, Judge.

REVERSED AND REMANDED (*with directions*).

D. M. Wilson, J. W. Clapp and *R. E. Ash* for appellant.

E. F. Nelson, J. M. Wattenbarger, Calfee & Painter and *John W. Bingham* for respondent.

RAILEY, C.—In the summer of 1911, plaintiff, residing in Scotland County, Missouri, bought of one Dodson a farm of 240 acres, lying in Sullivan County. It was then in possession of defendant under a lease from Dodson for a year ending the following first of March, 1912. At the end of said lease defendant refused to quit the premises, and this action of unlawful detainer was instituted.

The judgment in the circuit court was for the defendant. The latter claims a rightful possession by reason of a verbal renting from plaintiff entered into the latter part of August, 1911, shortly after plaintiff bought

from Dodson, whereby he was to have the land for a year from the expiration of his lease aforesaid, viz., from the first of March, 1912, up to the first of March, 1913; he to plow about thirty-five acres of sod in the fall of 1911, and give a part of the crop when matured.

The case was duly appealed to the Kansas City Court of Appeals by plaintiff, and the latter court, in an opinion by Judge ELLISON, reported in 178 Mo. App. 309, in which all the members of said court concurred, reversed the case, and certified it to this court, on the ground that said decision was in conflict with the decision of the Springfield Court of Appeals in *Winter v. Spradling*, 163 Mo. App. 77. Judge ELLISON's opinion, *supra*, was filed April 6, 1914. The opinion of the Springfield Court of Appeals, in *Starks v. Manufacturing Co.*, 182 Mo. App. 241, was not filed until June 27, 1914, and hence, the decision of said court in *Winter v. Spradling*, 163 Mo. App. 77, contained its latest utterances upon the subject under consideration, when the present case was transferred to this court.

In *Winter v. Spradling*, plaintiffs leased certain lands to defendant for a period of three years, ending March 1, 1911. Defendant went into possession and continued in possession beyond the expiration of that lease and was still in possession when the action for unlawful detainer was instituted. Defendant claimed that in July, 1910, he made an oral agreement with Winter, the owner of said land, by the terms of which he leased the land for another year, to begin at the expiration of said written lease on March 1, 1911, and to expire March 1, 1912. As part of the terms of said verbal lease, certain improvements were to be made on the land, for which plaintiff was to furnish the material and defendant was to perform the labor, and that part of those improvements were made as agreed. Defendant also plowed eight acres of ground preparatory to sowing wheat. After this was done, plaintiffs, on August 15, 1911, notified defendant that they wanted possession at the expiration of the written lease and noth-

ing further was done in relation to the oral lease. Suit was filed March 4, 1911, before a justice of the peace, and the cause removed to the circuit court on *certiorari*. Judgment was rendered for defendant and the plaintiffs appealed to the Springfield Court of Appeals. The latter reversed and remanded the cause and held that plaintiffs were entitled to recover. The conclusion reached, as to the disposition of the case, was in accord with the views expressed by Judge ELLISON in the case at bar, but certain principles of law are announced in the Winter-Spradling case which are in conflict with the ruling of the Kansas City Court of Appeals in this case, and likewise in conflict with the rulings of both divisions of the Supreme Court.

Judge Cox, in the Winter case, on page 83, said: "If defendant had been out of possession when the oral contract of lease was made, and were he now seeking to hold possession as a tenant from year to year, it is clear that he would have to show that the lessor put him in possession under the oral contract of lease. He could not call to his aid a possession taken without the lessor's knowledge or consent. Neither can he in this case call to his aid an act of his own done without the lessor's knowledge or consent and thereby change the character of his possession. *While there would be nothing inconsistent in defendant holding possession under both the written and verbal leases at the same time, yet, when the evidence that he was holding under both consists of his own acts, it would be manifestly unjust to plaintiffs to bind them thereby when they had no knowledge of what he was doing.*"

The principle of law, announced in the italicized portion of above quotation, is in conflict with the conclusion reached by Judge ELLISON in this case.

The cause was properly certified to the Supreme Court.

In the well considered opinion of Judge SHERWOOD in Emmel v. Hayes, 102 Mo. l. c. 193-4, it is said:

"The taking possession of a tract of land by a vendee, under a parol contract made by a vendor to convey to him, and with the consent of such vendor, will take the case out of the Statute of Frauds, and authorize compulsory specific performance *only* where such taking of possession is *pursuant to, and referable solely to, the parol contract*. Nothing short of this unequivocal act of taking possession will suffice. . . . The uniform statement of the text-writers and the reported ruling of adjudged cases is that mere *continuance* of possession does not constitute part performance. There must be a *radical* change in the attitude of the contracting parties towards each other, a change consisting of *acts done*; a *notorious* change which *itself indicates* that *some contract* has been made between the parties, and *then* parol evidence is admissible to show the details of the agreement."

The above opinion overruled the case of *Simmons v. Headlee*, 94 Mo. 482, in which a different conclusion was reached. The rule of law announced by Judge SHERWOOD *supra*, has been followed in subsequent cases as follows: *Rogers v. Wolfe*, 104 Mo. l. c. 10; *Taylor v. Von Schraeder*, 107 Mo. l. c. 228; *Cherbonnier v. Cherbonnier*, 108 Mo. l. c. 263-4; *Hays v. Kansas City, Ft. S. & G. Ry. Co.*, 108 Mo. 549-550; *Warren v. Castello*, 109 Mo. l. c. 342; *Rosenwald v. Middlebrook*, 188 Mo. l. c. 93; *Swearingin v. Stafford*, 188 S. W. (Mo.) 97-99; *Starks v. Manufacturing Co.*, 182 Mo. App. l. c. 244-5.

The opinion of the Kansas City Court of Appeals in this case is in accord with the principles of law enunciated in the above authorities and meets with our approval.

The judgment of the circuit court is accordingly reversed. *Brown, C.*, concurs.

PER CURIAM:—The foregoing opinion of RAILEY, C., is hereby adopted as the opinion of the court. All of the judges concur.

PLAINTIFF'S MOTION TO MODIFY JUDGMENT,
AND DEFENDANT'S MOTION FOR REHEAR-
ING.

PER CURIAM:—Plaintiff's motion to modify the judgment of reversal herein, is sustained, and said cause is hereby reversed and remanded with directions to the trial court, to allow plaintiff, if he so desires, to amend his complaint; to proceed with said cause in conformity to the views heretofore expressed, and to enter judgment in behalf of plaintiff as contemplated by section 7674, Revised Statutes 1909. The defendant's motion for a rehearing is overruled.

KANSAS CITY v. RICHARD H. FIELD, Appellant.

Division Two, March 30, 1917.

1. **JUDGMENT: Execution After Ten Years.** Execution cannot issue in any case after the expiration of ten years from the date the unrevived judgment was rendered.
2. ———: ———: **Special Tax Bill: City Charter: Paramount Statute.** And though the judgment was based upon a benefit assessed against a lot as its share of the cost of a public improvement and the city charter says such judgment shall be a lien until the assessment is paid, such charter provision must yield to the paramount authority of the State statute, and execution cannot issue after the period of ten years mentioned in the statute has expired.
3. ———: ———: **Matter of General Policy.** Whether an execution can be issued upon an unrevived judgment after ten years is a matter pertaining to the general laws and policy of the State, and not one relating strictly to municipal affairs or coming under municipal control. And although the judgment grows out of an assessment of the costs of a public park against lots within the benefit district, and the city charter prescribes as the method of enforcing such assessment the judgment of a court of general jurisdiction, yet that judgment, like any other of such a court, is controlled by the statute, and an execution based on it must follow the course of other executions issuing out of such courts.

 Kansas City v. Field.

4. ———: ———: **Effect of Appeal.** A judgment expires by limitation in ten years after it is rendered in the circuit court, whether appealed from or not. The statute (Sec. 1912, R. S. 1909) says that the period of ten years is to be counted "from the date of the original rendition" of such judgment.
5. ———: ———: ———: **Supersedeas.** An appeal does not stay a judgment, or stay the issuance of execution thereon. It is the *supersedeas* statute which, upon condition, stays a judgment pending an appeal upon the appellant's making and filing the requisite bond; and if a judgment be not suspended or stayed by a *supersedeas* bond, it continues, pending an appeal, in full force and vigor, and execution may issue.
6. ———: ———: ———: **Ten Years After Affirmation.** Where the judgment was affirmed on appeal on June 30, 1903, the mandate issued out of the appellate court on July 11, 1903, and was filed in the circuit court on July 12, 1903, an execution issued on July 12, 1913, was issued ten years and twelve days after the judgment was affirmed, and even if it be admitted that the statute was tolled by the appeal, and in any view of the case, the execution should be quashed.

Appeal from Jackson Circuit Court.—*Hon. Joseph A. Guthrie*, Judge.

REVERSED AND REMANDED (*with directions*).

Gage, Ladd & Small and *R. H. Field* for appellant.

(1) The execution was unauthorized and void because not issued within ten years from June 19, 1900, the date of the original rendition of the judgment. R. S. 1909, sec. 2133; *George v. Midaugh*, 62 Mo. 549; *Goddard to use v. Delaney*, 181 Mo. 571; R. S. 1909, sec. 1912; *Martin v. St. Louis*, 139 Mo. 260; *Eysell v. St. Louis*, 168 Mo. 607; *St. Louis v. Realty Co.*, 175 Mo. 63; *Dreyer v. Dickman*, 131 Mo. App. 660; *Dorland v. Smith*, 93 Cal. 120; *New York v. Colgate*, 12 N. Y. 140. (2) The judgment or order for the recovery of the benefit assessment in this proceeding, against appellant's lands, was conclusively presumed to be paid and satisfied, when the execution was issued, because more than ten years had elapsed, "after the date of the original rendition thereof," with no revival of the

judgment nor any payment thereon within ten years before the issue of the execution. R. S. 1909, sec. 1912. And see, on the presumption of payment, prescribed in section 1912: Davis v. Carp, 258 Mo. 687; Cobb v. Houston, 117 Mo. App. 645; Chiles v. School District, 103 Mo. App. 240. See also: Gaines v. Miller, 111 U. S. 399. The presumption of payment of judgments, created by the provision in section 1912 of the Revised Statutes, is a rule of evidence, in legal effect, the full equivalent of proof of actual payment of a judgment. It is more. It is a presumption that cannot be rebutted by counter proof, that the judgment has not been paid; not even by proof of a solemn admission of the judgment debtor that the same has not been paid. This was said by this court of a like statute. Baker v. Stonebraker's Adm., 36 Mo. 349. And the like presumption of payment has elsewhere been applied to judgments, *in rem* and for taxes, which were made a lien until paid. Fisher v. Meyer, 67 N. Y. 74; In re Asher's Estate, 202 Pa. St. 422, 90 Am. St. 658; Carter v. Turnpike Co., 208 Pa. St. 565; Hayes Appeal, 113 Pa. St. 380; Brian v. Tims, 10 Ark. 597. (3) The fact that the city has received payment from other persons on other pieces of property, within ten years before the date of the execution, is immaterial to the issue here on the assessment against appellant's property on which the city claims no payment: Because (a) as said by this court in Kansas City v. Block, 175 Mo. 443, "the judgment is not an entirety, the interests of the parties are independent of each other;" and (b) because no payment is "entered upon the record" of the judgment. A payment on the judgment, unless "duly entered on the record thereof," does not save the judgment from the statute. R. S. 1909, sec. 1912. (4) The general statute cited applies to the adjudication, for the recovery of the special benefits in this proceeding, whether it be considered a judgment or only an order of the court, because said section 1912 expressly includes "every judgment, order or decree

Kansas City v. Field.

of any court of record." *Plum v. Kansas City*, 101 Mo. 532; *Shickle v. Watts*, 94 Mo. 411, 420; *Lafayette Company v. Wonderly*, 92 Fed. 316. (5) The circuit court proceeding, in this action, as provided for in the Kansas City charter, is a judicial proceeding from start to finish. *Kansas City Charter*, Annotated 1898, art. 10, secs. 11 to 17. (6) Section 17, article 10, of said city charter expressly names the adjudication for the recovery of the benefits assessed in this proceeding a "judgment," and provides for its enforcement by "execution" and not otherwise. Being made enforceable by execution, the adjudication is, in substance and effect, indisputably a judgment. *St. Louis v. Realty Co.*, 259 Mo. 126; *Kansas City v. Ward*, 134 Mo. 183; *Plum v. Kansas City*, 101 Mo. 532. (7) And such adjudication is fortified against attack, both collaterally and on appeal, because it is a judgment in a judicial proceeding. *Kansas City v. Plum*, 101 Mo. 531; *Leonard v. Sparks*, 117 Mo. 115; *Kansas City v. Burk*, 118 Mo. 309, 327; *Kansas City v. Duncan*, 135 Mo. 517; *Kansas City v. Bacon*, 147 Mo. 275; *Martin v. St. Louis*, 139 Mo. 260; *Connors v. St. Joseph*, 237 Mo. 613; *Kansas City v. Mastin*, 169 Mo. 88; *Robinson v. Levy*, 217 Mo. 513; *Skillman v. Clardy*, 256 Mo. 321; *Kansas City v. Block*, 175 Mo. 443; *Brunn v. Kansas City*, 216 Mo. 115. (8) And this judgment for benefit assessments is subject to the general statutes of limitation. *Dorland v. Smith*, 93 Cal. 120; *Colgate v. New York*, 12 N. Y. 140; *Donnelly v. Brooklyn*, 121 N. Y. 18; *Dousman v. St. Paul*, 23 Minn. 394; *Duncan v. Ry. Co.*, 22 Mo. App. 614; *Martin v. St. Louis*, 139 Mo. 260. And is subject to the same presumption of payment as ordinary judgments. *Fisher v. Meyer*, 67 N. Y. 74; *In re Asher's Estate*, 202 Pa. St. 422; *Carter v. Turnpike Co.*, 208 Pa. St. 565. (9) The fact that the city charter might have made this proceeding administrative by its own officers, wholly outside of the State agency of the circuit court, does not render the circuit court proceeding provided, any the less a judicial proceeding, nor any the

less subject to the State statutes concerning judgments and executions. *Skillman v. Clardy*, 256 Mo. 320; *Haag v. Ward*, 186 Mo. 326-344; *Robinson v. Levy*, 217 Mo. 513. (10) The general statutes concerning judgments and executions apply to special judgments and special executions. R. S. 1909, sec. 2172; *Smith ex rel. v. Rogers*, 191 Mo. 344; *Skillman v. Clardy*, 256 Mo. 320; *Kansas City v. Woerishoeffer*, 249 Mo. 26; *Plum v. Kansas City*, 101 Mo. 530; *Groner v. Smith*, 49 Mo. 323; *Eyssell v. St. Louis*, 168 Mo. 607; *Duncan v. Railroad*, 22 Mo. App. 614; *Haag v. Ward*, 186 Mo. 326-344; *Kansas City v. Smith*, 238 Mo. 338; *Railroad v. Swan*, 120 Mo. 35; *Crittenden v. Leitensdorfer*, 35 Mo. 243; *Green v. Dougherty*, 55 Mo. App. 217. (11) This court has been uniformly against inferring any exception to such comprehensive general statutes. *Bolton v. Landsdown*, 21 Mo. 400; *Crittenden v. Leitensdorfer*, 35 Mo. 243; *Lafayette Co. v. Wonderly*, 92 Fed. 313; *Plum v. Kansas City*, 101 Mo. 530; *State ex rel. v. Dirckx*, 211 Mo. 581; *Skillman v. Clardy*, 256 Mo. 320. (12) The city could have had the execution issued in 1904, for all of the benefits assessed, on and after default upon the first installment of the benefits assessed. Last clause Sec. 21, art. 10, City Charter, Annotated 1898, p. 182; *Jaicks v. Murrill*, 201 Mo. 101. (13) The general statute ran on the judgment "from the date of the original rendition thereof," notwithstanding the judgment for special benefits was payable in successive annual installments. In point: *Dreyer v. Dickman*, 131 Mo. App. 660. See also: *George v. Midaugh*, 62 Mo. 549; *Cobb v. Houston*, 117 Mo. App. 645. (14) The *Mulkey* appeal did not suspend nor interrupt the running of the general Statute of Limitations on the judgment "from the date of the original rendition thereof;" and the time of the pendency of that appeal is not to be deducted in computing the ten-year limitation against execution on the judgment. *Christy v. Flanagan*, 87 Mo. 670; *Green v. Dougherty*, 55 Mo. App. 217; *Eyssell v. St. Louis*, 168 Mo. 620; *Deposit Co. v. Schuchman*,

Kansas City v. Field.

189 Mo. 472; *Ins. Co. v. Hill*, 17 Mo. App. 590; *Richardson v. Harrison*, 36 Mo. 96; *Dorland v. Smith*, 93 Cal. 120. And this is plainly so, because the only thing the statute permits to extend the life of the judgment, "after ten years from the date of the original rendition thereof," is a revival of the judgment or a payment thereon. R. S. 1909, sec. 1912. (15) The Kansas City charter, not having prescribed any time or condition after which the judgment should be presumed paid, nor any limit of time within which execution should issue thereon, the cited general Statutes of Limitation and presumption of payment apply to such judgments and executions *Pleadwell v. Glass Co.*, 151 Mo. App. 63; *Plum v. Kansas City*, 101 Mo. 530; *Railroad v. Swan*, 120 Mo. 35; *Const. Co. v. St. Louis*, 231 Mo. 591; *Kansas City v. Smith*, 238 Mo. 338; *Skillman v. Clardy*, 256 Mo. 319. (16) And *a fortiori*, this proceeding is subject to the general Statute of Limitation, because the State Constitution, under which Kansas City framed and adopted its charter, in terms made Kansas City and its charter-making "subject to the Constitution and laws of the State." Constitution, art. 9, sec. 16; *Mullins v. Kansas City*, 188 S. W. 193; *Haag v. Ward*, 186 Mo. 326.

J. A. Harzfeld, Jay M. Lee, Delbert J. Haff, Edwin C. Meservey and Charles W. German for respondent; *William C. Michaels* of counsel.

(1) The Kansas City charter provisions control the issuance of execution to enforce the collection of assessments involved in this case. *Murnane v. St. Louis*, 123 Mo. 479; *Kansas City v. Scarritt*, 127 Mo. 642; *St. Louis v. Gleason*, 15 Mo. App. 25, 93 Mo. 33; *State ex rel. v. Field*, 99 Mo. 352; *Kansas City v. Oil Co.*, 140 Mo. 458; *St. Louis v. Dorr*, 145 Mo. 466; *Stevens v. Kansas City*, 146 Mo. 460; *Kansas City v. Bacon*, 147 Mo. 259; *Meier v. St. Louis*, 180 Mo. 391; *Morrow v. Kansas City*, 186 Mo. 675; *St. Louis v. Liessing*, 190 Mo. 464; *St. Louis v. DeLassus*, 205 Mo. 578; *Paving Co. v. Meservey*, 103 Mo. App. 186; *Construction Co.*

Kansas City v. Field.

v. Coal Co., 205 Mo. 63; Brunn v. Kansas City, 216 Mo. 108; Sec. 3707, R. S. 1899; Stanton v. Thompson, 234 Mo. 11; State ex rel. v. Seehorn, 246 Mo. 556; Paving Co. v. Harvard, 248 Mo. 280; Sec. 7181, R. S. 1909; Kansas City v. Woerishoeffer, 249 Mo. 1; Paving Co. v. Field, 134 Mo. App. 668; Charter of Kansas City 1898, sec. 8 to 28, art 10; Charter of Kansas City 1909, sec. 8 to 28, art. 13; Smith v. Mitchell, 33 Am. Dec. 119; 5 Words and Phrases, p. 4165; Riddlesbarger v. Ins. Co., 74 U. S. 386; Sec. 4944, R. S. 1909; St Louis v. Realty Co., 259 Mo. 126; Kansas City v. Land Co., 260 Mo. 395; 23 Cyc. 1467; Moore v. Williams, 129 Ala. 329; Van Renssler v. Wright, 25 N. E. 3; Sheldon v. Mirick, 39 N. E. 647. (2) Ten years had not elapsed between the rendition of the judgment and the issuance of the execution. State ex rel. v. Gill, 84 Mo. 248; Kansas City v. Hennegan, 152 Fed. 249; Paving Co. v. Meservey, 103 Mo. App. 186.

FARIS, J.—This is an appeal from the circuit court of Jackson County, wherein upon motion to that end, the court refused to quash an execution which had been levied upon the land of movant, who is appellant here.

On the *19th day of June, 1900*, as the result of a certain proceeding to condemn lands for a park to be known as West Terrace Park, and to assess benefits to produce a fund to recoup the city for its outlay in payment for the condemned lands, judgment was rendered, among others against the lands of movant. Movant did not appeal from the latter judgment, but one Catherine Mulkey appealed on her part from the judgment assessing benefits against her land, which appeal was decided against her by this court *on the 30th day of June, 1903*. [See Kansas City v. Mulkey, 176 Mo. 229.] Mandate was issued by this court in the last-mentioned appeal *on the 11th day of July, 1903*. The execution herein sought to be quashed was issued *on the 12th day of July, 1913*. The mandate from this court was filed in

Kansas City v. Field.

the circuit court of Jackson County *on the 13th day of July, 1903*. The motion to quash the execution filed by movant, so far as it is pertinent, is, caption and signature of counsel omitted, as follows:

“Now, on this 30th day of July, 1913, comes Richard H. Field, and states and shows to the court:

1. That he is and was at the times hereinafter named, the owner of the following described real estate in Kansas City, Jackson County, Missouri, to-wit:

“The west fifty-two feet of the south sixteen feet of Lot No. Thirteen and the west fifty-two feet of Lot No. Fourteen, Coffman’s Addition.

“2. That, on July 12, 1913, the clerk of the circuit court of Jackson County, Missouri, issued and delivered to the sheriff of said county an execution of that date on a judgment of said circuit court at Kansas City, in the above entitled cause, dated and rendered June 19, 1900, for \$92.83, against the above described real estate, and also for other sums against other lots and parcels of real estate in said city described in said execution in which said Richard H. Field was and is in no wise interested or concerned.

“3. That said execution or the record in the case does not show that said execution was issued on a live judgment, or that the clerk of said court had any right or authority to issue said execution against the said real estate of the maker of this motion.

“4. That said execution was issued after the expiration of ten years from June 19, 1900, the date of the original rendition of said judgment; and said judgment had not been revived, and no payment had been made on said judgment against the above described real estate at any time within ten years before July 12, 1913, the date of said execution.

“Wherefore, the said Richard H. Field moves the court to quash said execution as to his said real estate above described, and for judgment for costs hereon.”

In passing upon this motion the learned court *nisi* made a special finding of facts which will serve to make

clear the ruling facts of the case. This special finding of facts is as follows:

"1. That Richard H. Field is and was the owner of the land described in his motion filed in this cause to quash the execution issued herein.

"2. That on July 12, 1913, the clerk of the circuit court of Jackson County, Missouri, issued and delivered to the sheriff of said county an execution of that date on the judgment of this court in this case, dated and rendered June 19, 1900, for \$92.83, against the said described real estate, and also for other sums against other lots and parcels of real estate in said city, described in said execution, in which said Richard H. Field was and is in no wise interested or concerned.

"3. That said execution was issued after the expiration of ten years from June 19, 1900, the date of the original rendition of said judgment, and that said judgment had not been revived, and that no payment had been made on said judgment against the said described real estate of Richard H. Field at any time within ten years before July 12, 1913, the date of said execution.

"4. The court further finds that this cause was appealed by certain parties to the Supreme Court of Missouri, which court affirmed the judgment of the circuit court on June 30, 1903, and the mandate of the said Supreme Court, dated July 11, 1903, was filed with the clerk of the circuit court of Jackson County, Missouri, at Kansas City, Missouri, on July 13, 1903.

"Thereupon, the court being fully advised in the premises, overrules the said motion of Richard H. Field, to which ruling of the court the said Richard H. Field excepts."

If facts in addition to the above are found necessary to make clear what we find it necessary to say, we will set them out in the opinion, *infra*.

I. The briefs are able and extremely voluminous, covering not only the points which seem to control the

Kansas City v. Field.

case, but also many interesting points afieid. However, the two points, decision of which seems to settle the case, are these: (a) Does the general Statute of Limitations so far bar a judgment such as that here as to forbid after ten years the issuance of an execution thereon, and (b) did the appeal of Catherine Mulkey have the effect to extend the time, or toll the statute for the period that such appeal was pending here? For convenience we sometimes refer to section 1912, *infra*, as a Statute of Limitations. Whether it be so, or merely the concrete statement of a rule of evidence, we do not decide.

That an execution may not issue upon an ordinary judgment after ten years, is well-settled. For the following statute so ordains, to-wit:

“Every judgment, order or decree of any court of record of the United States, or of this or any other State, territory or country, shall be presumed to be paid and satisfied after the expiration of ten years from the date of the original rendition thereof, or if the same has been revived upon personal service duly had upon the defendant or defendants therein, then after ten years from and after such revival, or in case a payment has been made on such judgment, order or decree, and duly entered upon the record thereof, after the expiration of ten years from the last payment so made, and after the expiration of ten years from the date of the original rendition or revival upon personal service, or from the date of the last payment, such judgment shall be conclusively presumed to be paid, and no execution, order or process shall issue thereon, nor shall any suit be brought, had or maintained thereon for any purpose whatever.” [Sec. 1912, R. S. 1909.]

Another general statute cited and urged by movant as apposite, reads thus:

“Executions may issue upon a judgment at any time within ten years after the rendition of such judgment.” [Sec. 2133, R. S. 1909.]

It is urged by respondent, however, that neither of the above statutes is applicable, but that the matter is controlled by an alleged applicable provision of the charter of Kansas City, which in full reads thus:

“After the judgment of confirmation of such verdict and proceedings, the clerk of said court shall certify under the seal of said court, to two copies of said verdict, one of which copies he shall deliver to the city treasurer and one to the city auditor, and said assessments for benefits, if any, against private property shall be a lien from the date of the taking effect of the ordinance in pursuance of which said assessments are made and said proceedings instituted, and shall attach to the several lots or parcels of land so assessed with benefits as aforesaid; and said lien shall continue against each lot or parcel assessed until the assessment against such lot or parcel has been paid or collected in full, both principal and interest. No assessment shall be defeated or affected by any irregularity affecting any other assessment or from the rendering of any other assessment invalid in whole or in part.” [Sec. 20, art. 10, Charter 1898, Kansas City.] (We have italicised the particular part of the section supra upon which respondent relies.)

Does this charter provision so far control as that execution may issue after ten years? Passing for the present the obvious query whether the language of the charter quoted supra carries, inevitably, the meaning which respondent puts on it, we do not think the provision even as construed by respondent has the effect claimed for it. It is self-evident that since Kansas City is in Jackson County and therefore an integral component of the State of Missouri, the general laws of the State run there and will control unless the Constitution, or other laws passed pursuant thereto, have abdicated this right of control. If this right of control has been delegated it comes from the below quoted pertinent provisions of our statutes. Appositely pertinent parts

Kansas City v. Field.

of section 9703, *following the Constitution itself* (Constitution, sec. 16, art. 9.), provide:

“Any city having a population of more than one hundred thousand inhabitants may frame a charter for its own government, consistent with and subject to the Constitution and laws of this State, by causing a board of thirteen free-holders, who shall have been for at least five years qualified voters thereof, to be elected by the qualified voters of such city at any general or special election, which board shall, within ninety days after such election, return to the chief magistrate of such city a draft of such charter signed by the members of such board, or a majority of them; . . . but such charter shall always be in harmony with and subject to the Constitution and laws of the State.”

By the next following section it is provided that after the adoption and ratification thereof such charter “shall be and constitute the entire organic law of such city and shall supersede all laws of this State then in force in terms governing or appertaining to cities having one hundred thousand inhabitants or more.” [Sec. 9704, R. S. 1909.]

It will be noted that the Legislature exercised a large degree of care and caution in providing precisely what laws should be superseded upon the adoption of a charter by a city authorized to do so. Such supersession is expressly limited to such laws as “*in terms*,” that is, specifically, “govern and appertain to cities having one hundred thousand inhabitants or more.” But we have had in many cases to construe how far this provision of the statute superseded laws of the State or municipality which would otherwise govern and control. [McGhee v. Walsh, 249 Mo. 1. c. 280; Mullins v. Kansas City, 268 Mo. 444.] In the case of McGhee v. Walsh, *supra*, this Court in Banc said:

“The city of Kansas City is organized under a special charter pursuant to the provisions contained in the organic law (Sec. 16, art. 9, Constitution), and the statutory authority conferred by an act of the General

Assembly, approved March 10, 1887 (Laws 1887, pp. 42-51), and divers amendments thereto, subsequently passed. The charter under which this city is now working, was adopted and went into effect September 4, 1908. By the statute such charter when it went into effect automatically superseded the statutory provisions for the government of cities of the class into which by its population the Legislature had placed Kansas City (Sec. 6360, R. S. 1899); subject, however, to the limitation, that the provisions of such charter should be in harmony with the Constitution and laws of the State. [Sec. 6359, R. S. 1899.] That such is the legal effect of the adoption of such a charter, aside from the statute (which is lucid and clear), has been judicially determined by this court in several cases which came before us. [Kansas City v. Marsh Oil Co., 140 Mo. l. c. 471; St. Louis v. DeLassus, 205 Mo. l. c. 585; St. Louis v. Liessing, 190 Mo. l. c. 480.]”

Likewise in the Mullins case, *supra*, this division said: “It will be noted that the latter section does not say that such charter *shall supersede all laws of this State*, and stop there, but it modifies and limits the laws so superseded thereby as *laws then in force in terms governing cities having 100,000 inhabitants or more*. In short, the limitation of said section is as to a particular sort of laws, not general, but such as govern and appertain to cities having 100,000 inhabitants or more. But that is not all of the indicia which point to the meaning and proper construction of said section 9704. The latter section limits the laws which the charter supersedes to the entire organic law of such city. We know that, under our system and manner of speaking in this State, we apply the term ‘organic law’ of the cities of the several classes to the articles and chapters of the statutory laws which govern and regulate the several classes of cities, towns and villages; that in a way such articles and chapters delimit and fix the powers of such cities, towns, and villages in a manner similar to that in which the Constitution of the State sets bounds

Kansas City v. Field.

to the powers of the three co-ordinate branches of State government. Nor is this all; there is, as we view it and construe it, an express exception to the power conferred on such cities to frame a charter. This exception is that the provisions of such charter shall be 'subject to the Constitution and laws of this State,' and consistent therewith. [Sec. 9703, R. S. 1909.] This provision and limitation refers to all laws of the State, *except those then in force in terms governing and appertaining to cities having 100,000 inhabitants or more.*"

In the light of the provisions of our statute, which permits the issuance of an execution at any time within ten years after the rendition of a judgment (Sec. 2133), and of that which forbids the issuance after ten years of any execution upon any judgment, order or decree of any court of record (Sec. 1912, *supra*), we do not think there can be any doubt that the execution issued below in the instant case ought to have been quashed. [*Eysell v. St. Louis*, 168 Mo. 607; *St. Louis v. Annex Realty Co.*, 175 Mo. 63.]

Many cases are cited to us why this view should not be taken, but these cases but follow the fairly ancient case of *State ex rel v. Field*, 99 Mo. 1. c. 356, wherein it was ruled that the "matter of assessing damages and benefits for grading and regrading streets naturally falls within the domain of municipal government," and that a general law relating to municipal affairs may be in effect repealed by the adoption of a charter. To this aggregate of charter powers which fall naturally into the domain of municipal government may be added the method of "collecting the cost of street improvements." [*Murnane v. St. Louis*, 123 Mo. 479; *Kansas City v. Marsh Oil Co.*, 140 Mo. 458; *Kansas City ex rel. v. Scarritt*, 127 Mo. 642; *Kansas City v. Ward*, 134 Mo. 172; *St. Louis v. Dorr*, 145 Mo. 466; *Kansas City v. Bacon*, 147 Mo. 259.] In the case of *Kansas City v. Marsh Oil Co.*, *supra*, at page 471, the general rule by which we may distinguish matters of purely municipal control

from matters affecting the fixed general policy of the State, is thus laid down:

“So long as Kansas City, under its special charter, does not invade the province of general legislation, or attempt to change the policy of the State as declared in her laws for the people at large, it will not be held to be out of harmony with such laws, notwithstanding the provisions of the special charter may be different from the general statutes prescribed for the government of other cities in their local affairs.”

We think it is so clear as to render exposition unnecessary, beyond the mere statement of the proposition, that the question whether an execution can be issued upon an unrevived judgment after ten years, is one pertaining to the general laws and policy of the State, and not a question relating strictly to municipal affairs. It may be that some other method of collecting an assessment of the character here confronting us (*St. Louis v. Brinkwirth*, 204 Mo. 280) could have been devised, and thus have rendered a judgment upon the real property unnecessary. With that question we are not here concerned. Appellant does not question the inherent validity of the judgment; neither will we do so. The city saw fit to provide for a judgment of a court of record of general jurisdiction. That judgment became, so far as the point before us is concerned, like any other judgment, and execution thereon must follow the course of any other execution. If the issuance of an execution can be delayed for thirteen years, it can be delayed for thirty years, or three hundred years, which would be onerous in the case of the instant judgment which bears interest at the rate of *fifteen per cent per annum*. Granting for argument's sake the point which we do not meet here, and do not decide, that a necessity, rationally explainable, exists for the continuance of a lien beyond the general statutory limit, no reason can be seen for delaying the issuance of an execution for more than ten years. With such a rule differing so vitally and radically from the rule elsewhere in the State, and

Kansas City v. Field.

elsewhere in Jackson County even, no man could buy or sell real estate, nor could any lawyer pass upon title to real estate, with either satisfaction or certainty. Such a holding would result in the digging of pits for the feet of the unwary. The laws of the State announcing the general policy of the State create a conclusive presumption of payment of a judgment after the expiration of ten years, and forbid the issuance of an execution upon such an ancient judgment after that period has elapsed (Sec. 1912, *supra*) and since such a matter is not necessarily one of strictly municipal concern, no city has the right to adopt a charter or pass an ordinance in contravention of a plain statute announcing that policy.

The provision that fifteen per cent. interest may be charged upon such a judgment as a penalty—by analogy upheld for reasons that *arguendo* seem sufficient (Brunn v. Kansas City, 216 Mo. 108)—would or easily might, in a case like this, prove confiscatory. The judgment in the instant case has trebled, and is fast quadrupling.

We have approached the question from the point of view of respondent, contradicted by appellant most strenuously, that the quoted italicised part of section 20 of article 10 of the Kansas City Charter is in fact in contravention of the general statutes of the State. Counsel for appellant, as we understand them, urge that it is not opposed to, but in harmony with, the general laws. If it is not there is not and has not been any question before us, and the execution ought to be quashed for that reason, in addition to the one we have found ample to this end.

II. Which conclusion brings us to a consideration whether section 1912 is tolled by the fact of an appeal, wherein, and in final result, the judgment appealed from is affirmed. The language of the statute under discussion is that the period of ten years is to be counted "from the date of the original rendition" of such judgment, and that from and after the expiration of

Life of
Judgment:
Effect of
Appeal.

such period no execution may issue thereon. If the word "original" had not been used, there might be some doubt about the matter. For without this word a debatable question can be mooted as to time of the *rendition* of a judgment when such judgment is appealed from, but from the use of the word original we have no great difficulty in concluding that no execution may issue upon an unrevived judgment, if ten years has elapsed from the date of the rendition of such judgment by the circuit court, regardless of whether such judgment was appealed from or not. [George v. Middough, 62 Mo. 549; Smith v. Steel, 81 Mo. 455; Mullen v. Hewitt, 103 Mo. 639.] This view is not only according to the letter of the statute, but follows the reason of the thing as illuminated by analogy. For an appeal does not stay a judgment, or stay the issuance of an execution thereon. It is the *supersedeas* statute which, upon condition, stays a judgment pending an appeal upon the appellant's making and filing bond of the requisite sort and sum. If a judgment be not suspended or stayed by a *supersedeas* bond, it continues, pending an appeal, in full force and vigor. If it be not in fact *rendered* till an appeal is finally determined, it would be difficult to explain satisfactorily why execution pending appeal can be bottomed on a judgment which has never been *rendered*. Moreover, such a view, the indefinite delays incident for one or another reason upon an appeal regarded, would have the effect upon respondent's view being taken, to make some judgments continue in force without being revived, for eleven years; while others would be good for fifteen years or more. We conclude that a judgment expires by limitation, *caeteris paribus*, in ten years after it is rendered in the circuit court, whether such judgment be appealed from or not.

In passing we may say that upon no view can it be maintained in the instant case that the statute had not so far run as to forbid the issuing of an execution here. For the judgment *nisi* in the instant case was affirmed

Gunn v. United Railways.

here *on the 30th day of June, 1903*, but the execution here sought to be quashed *did not issue till July 12, 1913*, ten years and twelve days thereafter. So upon any view, the contention of respondent that ten years had not elapsed between the rendition of the judgment and the issuance of the execution under fire, must be overruled.

It results that this case must be reversed and remanded with directions to the circuit court to sustain the motion to quash the execution. Let this be done. All concur.

CATHERINE GUNN v. UNITED RAILWAYS COMPANY, Appellant.

Division Two, March 30, 1917.

1. **NEGLIGENCE: Boarding Moving Car: Contributory Negligence Per Se.** There is no cause of action against the carrier in favor of one who is injured as a result of his attempt to board a moving car if the carrier is guilty of no act of negligence beyond the mere fact that the car is moving at the time. In such case the person who attempts to board a car while it is in motion assumes the risk of injury from the ordinary movements of the car, but is not chargeable with negligence *per se*.
2. ———: ———: **After Slowing Down: Premature Start: Mental Excitement.** If a person, desiring to board a street car which merely slows down without stopping at the proper place or starts prematurely after having stopped, is laboring under great mental excitement, caused by facts which make it especially desirable and necessary to board the car at that place and such excitement is great enough to deprive him of the power to safely judge the dangers of the situation, and if the agents of the carrier know or under the circumstances are bound to be aware of such conditions of excitement, the carrier's failure to stop the car or to hold it a reasonable length of time is negligence, and the risk of injury from boarding the moving car is not assumed by such person; but if he is not laboring under such excitement, and is not directed by the carrier's agent to enter, he cannot recover for injuries caused by ordinary movements of the car.

Gunn v. United Railways.

3. ———: ———: **When Plaintiff May Recover.** A person seeking to recover damages for injuries received while boarding or leaving a moving street car, must show that the carrier caused him to be put in a dilemma, such as to cause excitement of mind rendering him for the moment unable to properly choose between two courses of action, or that the carrier's agents made some order, request or direction that he board or leave the car, or that there was some sudden shock or acceleration of speed of the car while he was getting on or off; or some defect in the car which increased the danger, or some other facts showing negligence of the carrier other than the mere fact that the car was in motion when he made the attempt to board or leave it.
4. ———: ———: ———: **No Contributory Negligence.** A person not under unusual excitement who attempts without invitation to board a moving street car after it has started in ordinary movement, cannot recover for injuries so received, regardless of the question of whether he was himself guilty of negligence, even though the car after having been stopped was started without giving him reasonable time to board it.
5. ———: ———: **Act of Entering: When a Passenger: Instruction.** One who has hold of the rail or has a foot on the step for the purpose of entering is in the act of entering the car. Nor is it the law that in all cases a person must have hold of the rail or have a foot on the step in order to be in the act of entering. If he intends to take passage on a street car and has hailed it for that purpose, and it has been stopped to enable him to enter, he is to be regarded as a passenger while he is in the act of carefully and prudently attempting to step upon the platform. So the carrier is not entitled to an instruction telling the jury that if when plaintiff took hold of the hand rail the car was moving, he cannot recover.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm*, Judge.

REVERSED AND REMANDED.

Boyle & Priest, R. E. Blodgett and Elmer C. Adkins for appellant.

Vincent McShane, John J. O'Brien and John M. Goodwin for respondent.

ROY, C.—Plaintiff recovered judgment for \$3500 as damages for personal injuries. The defendant appealed to the St. Louis Court of Appeals where the judgment was affirmed. REYNOLDS, P. J., filed a dis-

senting opinion in which he held that the majority opinion was contrary to the decision of this court in *Peck v. St. Louis Transit Company*, 178 Mo. 617, and the appeal was accordingly certified to this court. The opinions filed in the St. Louis Court of Appeals are reported in 177 Mo. App. 512, and in 160 S. W. 540.

The petition charges the defendant's negligence and the infliction of injuries thus:

"That on or about May 16, 1910, the plaintiff signaled the motorman in charge of one of defendant's cars, running north on Seventh Street, to stop said car at the north side of Morgan Street, where said Morgan Street intersects with Seventh Street, for the purpose of enabling her to board said car and become a passenger thereon, and that said motorman did stop said car at said point. That while said car was so stopped, plaintiff, with due care and caution on her part, started to get on the same, and that while the plaintiff was so engaged, defendant through its agents and servants did, before plaintiff had a reasonable time in which to get safely on said car, negligently and carelessly start said car, thereby hurling and throwing plaintiff backwards, with great force and violence, and dragging her, causing the injuries herein complained of.

"And for further allegation of negligence, plaintiff says that defendant, through its agents and servants, negligently and carelessly failed to allow plaintiff a reasonable time to get safely on said car, before starting it, and said defendant through its agents and servants, negligently and recklessly started said car, while plaintiff was with due care and caution on her part in the act of getting on same, thereby violently throwing her backward and dragging her, causing the injuries hereinafter set out."

The answer contains a general denial, and the following:

"Further answering, this defendant says that whatever injuries, if any, plaintiff may have sustained were caused by her own carelessness and negligence."

The reply is a general denial.

The plaintiff testified that she lived with her husband and five children; that on the day of the injury she was within two months of her confinement; that she had been shopping and was going home a quarter after one o'clock with her purchases in a basket; that the car stopped in response to her signal; that she had hold of the rail with her left hand, and had her right foot on the step, when the car started before she could get aboard; that she was dragged, and that some men held her on the car. She testified to serious injuries which she received, and which need not be here stated.

John C. Heman, a witness for plaintiff, testified:

"Q. You were on that car? A. Yes, sir.

"Q. Just tell the court and jury what you saw,

Mr. Heman? A. Why, I was standing on the back platform leaning up against the back end of the car, and the conductor was up in the front end of the car, and this car started off with a rush, and this lady, she was just about to step on the car, but the car had started, and she held it and run along with the car, and with that somebody pulled the signal rope and stopped the car. The car run probably about twenty feet, and she kind of fell back in on the step of the car, and there was another gentleman standing beside of me jumped over and reached with his arm and caught her before she fell. With that the car stopped and she straightened up and walked over to the sidewalk and stood there.

"Q. During the time this car started forward with a rush one of her feet was on the ground? A. I think that both of her feet was on the ground and she was run along with the car, that is the best of my recollection.

• "Cross Examination.

"Q. You say you were on the back platform? A. Yes, sir.

Gunn v. United Railways.

"Q. You saw this woman when she came to walk out and take this car? A. Yes, sir.

"Q. When she got hold of the upright rod the car was already in motion? A. I think the car was in motion, I am almost positive it was in motion, when she grabbed for it, she had a bundle, she swung around the rail, and she stepped back just before the car stopped, a gentleman grabbed her and helped her on.

"Q. The car stopped within fifteen or twenty feet, and after that she walked over to the sidewalk? A. Yes, sir.

"Q. Was she dragged? A. No, she was not.

"By Mr. Goodwin:

"Q. Did the car stop at the corner to take on passengers? A. Yes, sir.

"Q. While it stopped there she came up and started to get on? A. Yes, sir.

"By the court:

"Q. Had any other passenger got on the car there? A. No, I think she was the only passenger.

"Q. And the car stopped there? A. The car stopped, yes, and it started off with a sudden jerk, just about the time she reached for the rail, but she grabbed it, held on to it, and the car started off with a rush, and probably went some fifteen or twenty feet and the conductor was inside and somebody pulled the bell cord and it stopped very sudden." Paul Werner was on the car at the time. He testified for the defendant thus:

"Q. Where were you standing on that car? A. On the rear end of the rear platform.

"Q. Will you state just what happened there? A. The car down at Seventh and Morgan, if I am not mistaken, the car came to a stop, there was a lady, she was on the sidewalk, and the car came to, she was already stopped, and I don't know exactly if there was anybody got off or on, but the car, I seen her coming over to the car, but then I heard the bell

going, I thought the way she tried to go on the car, of course she couldn't go nowhere else, I thought by her expression, I thought she was coming to the car, I thought something would happen, I reached over with my hand, at that time the car already commenced to start, then she tried to put her foot on, I seen she couldn't hold herself on account she had so many bundles, I reached over and held her, the car stopped right there, if it was 20 or 50 or 100 feet I don't know.

"Q. Was this car in motion or stopped when she caught hold of the car? A. She was in motion.

"Q. The car was in motion, A. Yes, sir.

"Q. She didn't fall? A. No, she didn't fall, she could not fall, I held her."

On cross-examination the following occurred:

"Q. She was, in your judgment, at the time you first saw her, closer to the edge of the sidewalk than she was to the car? A. Yes, sir.

"Q. And she walked up and the car started out and she ran and grabbed the car while it was moving, is that it? A. She was pretty close to the car, the bell had already rung, but he didn't start right off when I heard the bell ring, when I seen her she had a little quicker march on her than when she came towards the car, and I thought right away something would happen, the car had already moved and then she grabbed and I grabbed her with my arm and she couldn't fall then.

"Q. The reason she couldn't fall was she had one foot on the running board, on the first step, when you grabbed hold of her? A. No, she grabbed to step on and at the same minute she stepped on I grabbed her.

"Q. Then as she put her foot on the lower step you grabbed her? A. I grabbed her.

"By Mr. Goodwin:

"Q. Now, when you saw her reach for the car, you knew a bell had been given and that there would likely be danger? A. Yes, sir.

Gunn v. United Railways.

"By the Court:

"Q. Did you say anything? A. No, sir; I never spoke to her.

"Q. Didn't speak to her at all? A. Except to holler to her to look out, when she came, when I seen her grab for the rail.

"Q. Then you did holler to her? A. Yes, sir; yes, sir; and at the same time I grabbed her, she had bundles in her arms and she couldn't—

"Q. You yelled "Look out" after she had hold of the car? A. Yes, sir.

"Q. You yelled "Look out" after she had hold of the car? A. No, no, when she tried to reach for it, I seen her reaching for it, but the car just started, and then the car went, and then she must have stepped on with one foot, I lifted her right clean up, I knew she would have fallen if I did not hold her.

"Q. How far did the car run? A. I don't know, maybe twenty, maybe thirty, maybe forty feet.

"Q. Maybe thirty feet? A. Yes, sir.

"Q. Was she dragged, was her other foot on the ground? A. No, she couldn't be dragging, because I was holding her, it was impossible, I would have been dragging too."

No instructions were asked by plaintiff and no fault is found with those given by the court of its own motion. The court refused Instruction No. 5 asked by defendant, but gave it with modifications. That instruction, with the modifications shown in italics, reads thus:

"The court instructs the jury that if you find and believe from the evidence that the plaintiff attempted to board a car while said car was in motion, *and that such act of plaintiff was negligence, and that the same contributed to her injury*, then she cannot recover and your verdict must be for the defendant."

Defendant's Instruction No. 1 was refused. It reads:

"The court instructs the jury that if you find and believe from the evidence that at the time the plaintiff took hold of the rail of the car, said car was moving, then plaintiff cannot recover and your verdict must be for the defendant."

I. There is a consensus of opinion of the courts of the country in support of the general rule that there is no cause of action against the carrier in favor of one who is injured as a result of his boarding or leaving a moving car where no act of negligence of the carrier is shown beyond the mere fact that the car was so moving at the time. Some of the courts hold that such an act is negligence *per se*, while others hold that though getting on or off a slowly moving car is not negligence *per se*, yet the passenger assumes all risk in so doing. They all agree that there can be no recovery. We cite *Haldan v. Great Western Ry. Co.*, 30 U. C. C. P. (Canada) 89; *Browne v. Railroad*, 108 N. C. 34; *Hunter v. Railroad*, 126 N. Y. 18; *Tobin v. Railroad*, 211 Pa. St. 457; *Damont v. Railroad*, 9 La. Ann. 441; *Gavett v. Railroad*, 82 Mass. 501; *Lauterer v. Manhattan Ry. Co.*, 63 C. C. A. 38; *Murphy v. Railroad*, 71 N. J. L. 5; *Ricks v. Railway Co.*, 118 Ga. 259; *Denver, S. P. & P. R. R. Co. v. Pickard*, 8 Colo. 163; *Weber v. Railroad*, 104 La. 367; *Kelly v. Railroad*, 70 Mo. l. c. 609; *Schepers v. Railroad*, 126 Mo. l. c. 676.

1 *Nellis on Street Railways* (2 Ed.), sec. 301, says: "It is not sufficient proof of the carrier's negligence merely to show that one attempting to board a street railroad car while barely moving as it reached the street crossing was thrown to the ground and injured. If, however, the car was started with a sudden jerk while the passenger was in the act of boarding, such added circumstances would be sufficient to take the case to the jury."

Booth on Street Railways, sec. 336, says:

Gunn v. United Railways.

"Although the act of boarding a car while in motion is always attended with some risks, the rules applicable to persons entering cars operated by steam are not usually applied with the same strictness to street railways. It is the general rule, established by numerous decisions, that if a person, who has the free use of his faculties and limbs, has given proper notice of his desire to be taken on, and the speed of the car has been slackened in the usual manner, it is not negligence *per se* to attempt to get on while it is moving slowly, and that if a passenger is injured under such circumstances the question of his contributory negligence is ordinarily one of fact for the jury. So when a car has been derailed and passengers, who have alighted, attempt to board while it is starting slowly, and are thrown off by a sudden jerk, or where the driver fails to stop for a boy who hails him, but tells him to jump on, and in attempting to do so the boy falls and is injured. But one who attempts to board a car while it is in motion does so at his own risk as to all ordinary movements of the car, and as to the presence of dangerous obstacles near the track."

This court in *Schepers v. Union Depot Railroad Co.*, 126 Mo. 665, cited the last above mentioned authority, and said: "The person making the attempt could only be held to assume the risk of injury from the ordinary movements of the car."

In *Neville v. Railway Co.*, 158 Mo. 293, 1. c. 316, it was said, "he would take the risk of alighting if the train was in motion."

II. The question arises as to what are the rights of the person desiring to get on or off the car if such car merely slows down without stopping at the proper place, or starts prematurely after having stopped.

If such person is laboring under some great and unusual mental excitement caused by facts which make it especially desirable or necessary to board or leave such car at that time and place, and such excitement is great enough to deprive such person of the power to safely judge the dangers of the situation, and if the agents of the carrier know, or, under the circumstances are bound to be aware of such condition of excitement, then the failure of the carrier to stop the car or to hold it a reasonable length of time is negligence, and the risk is not assumed by the person who may be injured. The first case in this court involving this general subject is *Loyd v. Railroad*, 53 Mo. 509, where it was said:

“Whilst it may be the law, that a passenger, who jumps from a train when in motion, takes the risk of injury to life or limb, it does not follow that the plaintiff in this case could be expected, whilst standing on the steps of the car, and after her child three years old had been lifted out, to have the presence of mind to deliberate on the propriety of following her child although the train immediately commenced to move, nor had she time to reflect on the danger of a straightforward movement at right angles to the train, instead of inclining in the direction the train was moving.

“The fact appears in evidence, that the train was behind time and that it did not stop a minute. All the witnesses compute the time by seconds.”

In *Solomon v. Manhattan Ry. Co.*, 103 N. Y. 437, it was said:

“It is, we think, the general rule of law, established by the decisions in this and other states, as claimed by the learned counsel for the respondent, that the boarding or alighting from a moving train is presumably and generally a negligent act *per se*, and that in order to rebut this presumption and justify a recovery for an injury sustained in getting on or

Gunn v. United Railways.

off a moving train, it must appear that the passenger was, by the act of the defendant, put to an election between alternative dangers, or that something was done or said, or that some direction was given to the passenger by those in charge of the train, or some situation created, which interfered to some extent with his free agency, and was calculated to divert his attention from the danger, and create a confidence that the attempt could be made in safety."

It was there also said:

"In boarding a moving train there is generally less excuse than in alighting from one. The party attempting it is not often under the same stress of circumstances as frequently happens in the former case. He may be compelled to wait for another train, but this is an inconvenience merely, which does not justify exposing himself to hazard."

It will be noticed that the courts of New York proceed on the theory that getting on or off a moving car is negligence *per se*, which is contrary to the rule followed by this court; yet we say that the person so doing assumes the risk of the ordinary movements of the car. In both cases an exception is made in favor of the person who is under temporary excitement as above mentioned. [See also *Newmark v. Railroad*, 111 N. Y. Supp. 379; *Johnson v. Railroad*, 70 Pa. 357; *Gavett v. Railroad*, 82 Mass. 501, l. c. 507; *Cousins v. Railroad*, 96 Mich. 386.]

III. Sometimes the order, direction or request of persons in charge of the car for persons to enter or leave the car will absolve such persons from the charge of negligence or assumption of risk. [3 *Michie on Carriers*, sec. 2821; *Newmark v. Railroad*, 111 N. Y. Supp. 379; *Railroad v. Gore*, 96 Ill. App. 553; *Pence v. Wabash Ry. Co.*, 116 Iowa, 279; *Wyatt v. Railway Co.*, 62 Mo. 408; *Kelly v. Railroad*, 70 Mo. 604; *Fulks v. Railroad*, 111 Mo. 335.]

Direction
to Board
Moving Car.

IV. When a car fails to stop, or, having done so, starts prematurely, a person desiring to board or leave the car may refrain from doing so and sue for damages for the inconvenience and loss thus suffered; but if he chooses to get on or off such moving car, and is not laboring under such excitement as above mentioned, and is not directed by the carrier's agent to so act, he cannot recover for injuries which he may receive caused by the ordinary movement of the car. [Railroad v. Aspell, 23 Pa. St. 147; Ginnon v. Railroad, 3 Rob. (N. Y. Superior) 25; Kelly v. Railroad, 70 Mo. 604.] In South Chicago City Ry. Co. v. Dufresne, 200 Ill. 456, it was said:

Boarding
Moving
Car Without
Direction
or Laboring
Under
Excitement.

"There were three counts in the declaration. The supposed negligence alleged in the first count was, that the defendant did not stop the car after the plaintiff had given notice of his intention to take passage, in consequence of which, while he was attempting to take passage, he was thrown to the ground. The second count alleged that defendant brought the car to a partial stop to allow plaintiff to take passage, and while he was attempting to secure a seat on the car increased the speed of the car with a sudden start or jerk, throwing him off. The third count alleged that the defendant stopped the car, and while plaintiff was attempting to secure a seat started it in a violent and sudden manner, by which he was thrown down. The first count did not state a cause of action for plaintiff's injury. If a refusal to stop cars on notice would give rise to a cause of action, it would necessarily be for damages resulting from the refusal to stop, which might consist of delay or loss of time, but the refusal to stop and accept him as a passenger would not be the proximate cause of the injury alleged."

That is the only case we have been able to find in which counsel for plaintiff ventured to state his case as in the first count of that petition. The ruling of the

court that such count did not state a cause of action was in accordance with the general rule of non-liability stated in the beginning of this opinion.

We make bold to assert, after a rather diligent search of the authorities, that we have found no case denying that general rule, though we have found cases where it was involved but overlooked. It necessarily follows that a person seeking to recover damages for injuries received while boarding or leaving a moving car, must show that the defendant caused the plaintiff to be put in a dilemma, such as to cause excitement of mind rendering him for the moment unable to properly choose between two courses of action, or there must be some order, request or direction by defendant's agents that the person shall board or leave the car, or some sudden shock or acceleration of the speed of the car while the person is getting off or on, or some defect in the car, or some other facts showing negligence of the defendant other than the mere fact that the car was in motion when the attempt was made.

If the petition in this case had merely alleged that the car stopped in response to plaintiff's signal, that it was then negligently started by defendant before plaintiff had reasonable time to get on it, and that plaintiff after it had started, attempted to get aboard the moving car and was injured by reason of the fact that the car was so moving, it would fail to state a cause of action. The general rule above stated would make it bad on demurrer. It is true that in such case there would be no presumption of negligence *per se* on the part of plaintiff, but it is also true that plaintiff must be held to have assumed the risk of danger in such a case. The mere absence of contributory negligence on plaintiff's part will not supply the lack of evidence of liability on the part of the defendant.

It will be noticed that, for the purposes of this case, we make no difference between an injury received in getting off a car and one received in getting on it.

Such being the case, the petition in *Ridenhour v. Railway Co.*, 102 Mo. 270, was exactly like this. It charged that the injury was caused by putting in motion a car which was "stopped." So does the petition now in hand. But the similarity of the two cases ends with the pleadings. The evidence in the former case is radically different from what it is here. It showed in that case that the injury occurred from the sudden jerk or acceleration of the speed of a slowly moving car from which the plaintiff was alighting as it was moving. While the opinion in that case does not state it in so many words the plain meaning of it is, that if the motion of the slowly moving car from which the plaintiff was alighting was suddenly accelerated, thereby causing the injury, the variance between the allegation that the car was stopped and the proof that it was slowly moving was not a fatal variance. The "jerk" of the car caused the injury regardless of whether the car was stopped or slowly moving at the time the jerk occurred. But it is not so here. The evidence of plaintiff supported the charge of the petition that the car was stopped, and that as she was boarding it it was started again without giving her time to get on safely. That evidence was properly submitted to the jury. But that was all the evidence there is of any actionable negligence on the part of defendant. There is no evidence that the car started and while plaintiff was boarding it as it moved there was a sudden jerk or acceleration of speed. There is no evidence that plaintiff was laboring under unusual excitement as above mentioned, nor that she was directed by defendant's agents to board the moving car, nor that there was any defect in the car. Though the defendant may have negligently started the car without giving plaintiff reasonable time to board it, if such starting was before plaintiff was in the act of attempting to get on the car without giving plaintiff reasonable time to board it, she, by

Gunn v. United Railways.

attempting to get on such moving car, assumed all risk from the ordinary movement of it.

It must follow from what has been said that the defendant's Instruction Number Five should have been given as asked. If she attempted to board the car after it started she can not recover, regardless of the question whether she was guilty of negligence. The mere absence of contributory negligence on her part does not give her a cause of action against the defendant in the absence of evidence showing liability on its part.

The cases of *Peck v. Transit Co.*, 178 Mo. 617, and *Northam v. United Rys. Co.*, 176 S. W. Rep. 227, are like this case as to the pleadings and evidence. In both those cases an instruction the same in substance as instruction 5 as asked by the defendant herein before its modification by the trial court, was approved. That instruction in both those cases simply said that if the plaintiff attempted to board (or leave, in the *Peck* case) the car after the car had started, the plaintiff could not recover. We will not review or discuss those cases, except to say that they were both properly decided. They overlook the general rule stated in the beginning of this opinion, but they do not oppose it and reach the same result as that required by such rules.

V. We concur in that part of the majority opinion of the Court of Appeals herein which holds that Instruction Number 1 asked by defendant was properly refused. There are many cases which hold that one who has hold of the rail or has a foot on the step for the purpose of entering the car is in the act of entering. But we know of no case holding that in all cases a person must have hold of the rail or have a foot on the step. Booth on Street Railways, page 530, says:

Entering
Car.

“Where a person intends to take passage on a street car and has hailed it for that purpose, and it has been stopped to enable him to enter, he is to be regarded as a passenger while he is in the act of carefully and prudently attempting to step upon the platform.”

In support of the text the author there cites *Smith v. St. Paul City Ry. Co.*, 32 Minn. 1, where an instruction was approved which said:

“If the plaintiff was not actually on the platform, but had hailed the car, and the car had stopped for the purpose of enabling him to take passage, and he was in the act of carefully and prudently attempting to step upon the platform, he is to be regarded as a passenger.”

Undoubtedly the would-be passenger must be in the act of boarding or attempting to board the car as distinguished from merely approaching it for the purpose of making such attempt. Under all the facts shown in evidence the defendant was not entitled to that instruction.

The judgment is reversed and the cause is remanded for a new trial.

White, C., not sitting.

PER CURIAM:—The foregoing opinion of *Roy, C.*, is adopted as the opinion of the court. All the judges concur.

CASES DETERMINED
BY THE
SUPREME COURT
OF THE
STATE OF MISSOURI
AT THE
APRIL TERM, 1917.

THE STATE *ex rel.* AMERICAN MANUFACTURING COMPANY *v.* THOMAS L. ANDERSON,
Judge.

In Banc, April 9, 1917.

1. **CIRCUIT COURT: Power to Order Examination of Premises for Evidence.** The circuit courts of Missouri are courts of original and general jurisdiction, possessing practically the same powers as *visi prius* courts in England, among which was the power to permit plaintiff and his counsel, in a civil suit against a corporation, to visit defendant's manufacturing plant, and enter upon its premises, with experts and photographers, for the purpose of inspecting and measuring the same, and making drawings and taking photographs to be used as evidence in the trial of said action; and such power was not taken away by the constitutional provisions against unreasonable search and seizure, nor is a legislative statute necessary to the exercise of such power by the court.
2. ———: ———: **Invasion of Property Rights: Similar to Examination by Physicians.** The power of the court to permit plaintiff, in a personal injury action based on a charge of an unsafe place in which to work or unsafe tools, to visit the factory of the company causing the injury, with proper persons and on a proper occasion, for the purpose of obtaining photographs or drawings to be used in the trial of the case, is based on the power of the court to know the facts which determine the plaintiff's right to recover and defendant's liability, and if reasonably exercised is not an invasion of

property rights, but is similar to the power of the court to compel the plaintiff suing for personal injuries to submit to an examination by physicians appointed by the court, and for a stronger reason should be upheld, since personal rights are superior to property rights, and their violation a more serious matter.

3. ———: ———: **Based Upon Inherent Relationship of Employment.**

Since the law requires the employer to furnish his employees a reasonably safe place in which and reasonably safe appliances with which to work, and a violation of either duty is a basis for a legal action for damages for personal injury to the employee, the law must either impose an implied agreement upon the employer, arising out of the contractual relation, that the employee, in case of injuries due to failure to provide such safety, shall have the right, at a proper time, in a reasonable manner and in company with proper persons, to visit and inspect such place and appliances, in order that they may testify as to their condition, or the law should expressly impose upon the employer the duty to expose to the injured employee and his experts, at a proper time and in a reasonable manner, the place where and the tools by which he was injured.

Prohibition.

WRIT DENIED.

Percy Werner for relator.

(1) The only provision in our Code of Procedure, conferring any authority upon our circuit courts similar to that attempted to be exercised here, is Sec. 1944, R. S. 1909, which reads: "Every court or judge thereof shall have power to compel any party to a suit pending therein to produce any books, papers and documents in his possession or power, relating to the merits of any such suit, or of any defense therein." If the order of the court in the instant case goes further than this provision of our code, it is inconsistent with the code and the court exceeded its powers in making it. *Expressio unius, exclusio alterius*. *Cook v. Mfg.*, 29 Hun, 641; *Ansen v. Tuska*, 24 N. Y. Sup. Ct. 663; *Kennedy v. Nichols*, 68 N. Y. S. 1053; *Auerbach v. Railroad*, 73 N. Y. S. 118; *Sutter v. City of New York*, 85 N. Y. S. 990; *Pina Mayo-Sisal Co. v. Mfg. Co.*, 105 N. Y. S. 482; *Wil-*

son v. Collins, 109 N. Y. S. 660; Danahy v. Kellogg, 126 N. Y. S. 444; Beyer v. Transit Co., 124 N. Y. S. 463; Martin v. Elliott, 106 Mich. 130; Newberry v. Carpenter, 31 L. R. A. 163; Rogers v. Hansen, 35 Iowa, 283; State v. Hancock, 148 Mo. 488.

John C. Robertson for respondent.

(1) The order made by the circuit judge was a lawful one and he had full authority therefor under the laws of this State and the decisions of the appellate courts of this and other States. Clark v. Dredging Co., 14 Cal. App. 414; Haynes v. Themlow, 123 Mo. 336; Paul v. Railroad, 82 Mo. App. 504; Marler v. Springfield, 65 Mo. App. 302; 3 Wigmore on Evidence, secs. 2162, 2194, 2221; 3 Jones on Evidence, sec. 406; Crosby v. Potts, 8 Ga. App. 463; Reynolds v. Burgess, 71 N. H. 332; Granger v. Ins. Co., 57 Miss. 308; Commonwealth v. Twichel, 1 Brewster (Pa.), 551; Sullivan v. Nicoulin, 113 Iowa, 76; Earl of Macclesfield v. Davis, 3 Ves. 16; Hensley v. Langton, 80 Fed. 178; Insurance Co. v. Grieson, 156 Fed. 398. (2) The old equity bill of discovery has been abolished in this State. Larimore v. Bobb, 114 Mo. 453; Carr v. Daues, 46 Mo. App. 356; Tyson v. Farm Home S. Co., 156 Mo. 594; Strode v. Frommeyer, 115 Mo. App. 220; Ex parte Brockman, 233 Mo. 135; Bacon on Mo. Practice, sec. 135. (3) Prohibition will not be granted as a substitute for an appeal or writ of error. State v. Evans, 184 Mo. 642; Schubach v. McDonald, 179 Mo. 182; State v. Hirzel, 137 Mo. 435; State ex rel. v. Scarritt, 128 Mo. 331; State ex rel. v. Klein, 116 Mo. 259; State ex rel. v. Smith, 104 Mo. 419.

WOODSON, J.—This is an original proceeding brought in this court by the relator, seeking to prohibit Hon. Thomas L. Anderson, judge of the circuit court of the city of St. Louis, from enforcing an order theretofore made by him in the case of Kalenik Zase-mowich v. American Manufacturing Company, a cor-

poration, the relator here, requiring defendant to permit plaintiff and his counsel to visit its plant, to enter upon its premises with experts and photographers to inspect, measure, make drawings and take photographs of certain portions of its plant and machinery, for the purpose of being used as evidence in said case.

The preliminary writ was issued, and upon the incoming of the return the relator asked for judgment of the pleadings.

There is no question made as to the order having been properly made by the court, after due notice having been given to the defendant, or that the order is not a reasonable one, provided the court had the power and authority to make it.

I. A foreword may not be out of place here: Under the common law and statutes of England, the person, property and premises of the individual were subject, practically unlimited, to search and seizure, which became so oppressive and intolerable that when the people of this country founded the various states and nation, sooner or later they provided in the Constitutions thereof, that the people should be secure in their persons, houses, papers and effects, against unreasonable search and seizure, etc. [Fourth Amendment of the Constitution of the United States; Sec. 11, art. 2, Constitution of Missouri.]

Right of
Search
and
Seizure.

There is but a single question presented by this record for discussion, and that is, has the circuit court the inherent power to make and enforce the order mentioned, unaided by statutory enactments?

Counsel for relator states his position in this language:

"We desire the court to understand at the outset that we make this application solely and only upon the ground that we believe that, under the law of this State as it exists at present, a circuit court is without

**Power to
Order
Examination
of Premises
for Evidence.**

power or authority to require compliance with any such order. We say this that our position may not be misunderstood. We are free to admit that enlightened procedure may demand statutory provision touching the matter in dispute.

We submit, however, that until the Legislature chooses to act, the trial courts are without legal power or authority to make or enforce such order as is attempted in this case."

It should be remembered that the circuit courts of this State are courts of original and general jurisdiction, practically the same as the *nisi prius* courts of England; and it goes without saying that those courts possessed and exercised that power and authority with practically no limitations. In fact, as previously suggested, it was the abuse of that judicial authority that lead the people of this country to adopt the constitutional provisions limiting the legislative and judicial authority in the regard stated; and if it was not for said constitutional limitations upon the circuit courts of this State, they would to-day possess the same untrammelled authority in that regard that the *nisi prius* of England possessed in earlier days.

Counsel for relator does not seem to question the soundness of this line of thought, but seems to be laboring under the impression that the constitutional limitations before mentioned completely shear the courts of the country of all authority to make and enforce orders of the character involved in this controversy, and that all the power they possess is created by statute, enacted after the adoption of said constitutional provisions.

There are some cases in this country which seem to lend support to that theory of the law but they are not based upon principle nor supported by the weight of authority. The cases so holding and cited

by counsel for relator are the following: *Cooke v. Manufacturing Co.*, 29 Hun, 641; *Ansen v. Tuska*, 19 Abb. Pr. 391; *Kennedy v. Nichols*, 68 N. Y. S. 1053; *Auerbach v. Railway*, 73 N. Y. S. 118; *Sutter v. City of New York*, 85 N. Y. S. 989; *Pina Maya-Sisal Co. v. Mfg. Co.*, 105 N. Y. S. 482; *Wilson v. Collins*, 109 N. Y. S. 660; *Danahy v. Kellogg*, 126 N. Y. S. 444; *Beyer v. Transit Development Co.*, 124 N. Y. S. 463; *Newberry v. Carpenter*, 31 L. R. A. (Mich.) 163; *Rogers v. Hanson & Co.*, 35 Iowa, 283. The New York cases are directly in point, but none of them is from a court of last resort, and consequently have but little weight.

The case of *Newberry v. Carpenter*, Circuit Judge, 31 L. R. A. 163, was a mandamus proceeding in which the relator asked to have the circuit judge required to vacate an order depriving the complainant of the possession and power of control over a certain boiler and some machinery owned by her, but in possession of the public authorities, for the purpose of use in connection with the criminal prosecution. There had been an explosion in the building owned by Miss Newberry, and one Johnson, the engineer, had been arrested and charged with manslaughter on account of alleged criminal carelessness in managing the boilers, by which the explosion occurred and thirty-seven people were killed and others were injured. The police took charge of the premises, and the boiler and premises and engine were by the circuit court ordered into the custody of the police department of the city of Detroit. The relator, Helen H. Newberry, who was not a party to the criminal prosecution, thereupon brought a suit in the Supreme Court in which she sought to mandamus the circuit judge to vacate the above mentioned order. Her counsel set forth in his brief that she was threatened with civil suits for damages on account of the accident. The Supreme Court reviewed the matter carefully and arrived at the conclusion that the circuit judge had no authority

or power to make such an order, and therefore awarded the writ of mandamus requiring the circuit judge to set his order aside.

In *Rogers v. Hanson & Co.*, 35 Iowa, 283, the court said, page 284:

"Before answering, the defendants moved the court for permission to use the attached machine [threshing machine] for the purpose of trying its capacity to do such work as it was warranted to do. This motion was supported by an affidavit that the sheriff was willing to have the machine so used and that the attorney of plaintiff would not consent. The court overruled the motion and the defendants excepted. They now assign this ruling as error. There is no principle of law which renders the granting of defendants' request obligatory upon the court . . . It seems too clear for argument that the court did not err in refusing to take it from the custody of the law and place it under that of the defendants."

In *State v. Hancock*, 148 Mo. 488, this court said (p. 492):

"After the evidence was closed, but before the case was submitted to the jury, defendant moved the court that the jury be taken to the room where the homicide is alleged to have been committed, to make a personal inspection of it, which was denied, and this also is one of the grounds assigned in the motion for new trial. In the absence of statutory enactment providing for such a course there is no authority in the trial of a criminal case for a view of the premises where the crime is alleged to have been committed (12 Am. & Eng. Ency. Law, 368), and even when the view is authorized by statute it rests altogether in the sound discretion of the court."

The last three cases considered are of doubtful application, but if authority for the contention of counsel for relator they bear so remotely upon the question here under consideration that they are by no means convincing.

Upon the other hand counsel for respondent cite and rely upon the following authorities in support of his position: *Clark v. Tulare Lake Dredging Co.*, 14 Cal. App. 414; *Haynes v. Trenton*, 123 Mo. 1. c. 336; *Paul v. Ry. Co.*, 82 Mo. App. 1. c. 504; *Marler v. Springfield*, 65 Mo. App. 1. c. 302; 2 *Wigmore on Evidence*, sec. 1162; 3 *Wigmore on Evidence*, secs. 2194 and 2221; 3 *Jones on Evidence*, sec. 406; *Crosby v. Potts*, 8 Ga. App. 463; *Reynolds v. Fibre Co.*, 71 N. H. 332; *Grangers' Ins. Co. v. Brown*, 57 Miss. 308; *Commonwealth v. Twitchell*, 1 Brewster (Pa.), 551; *Sullivan v. Nicoulin*, 113 Iowa, 76; *Earl of Macclesfield v. Davis*, 3 Ves. & B. 16, 35 Eng. Rep. 385; *Henszey v. Coal Min. Co.*, 80 Fed. 178; *Mutual Life Ins. Co. v. Griesa*, 156 Fed. 398.

In the case of *Clark v. Tulare Lake Dredging Co.*, supra, the Supreme Court of California, in discussing this question, said:

"Exception No. 16 involves the action of the court in making an order that a witness for plaintiff be allowed to inspect or examine the machinery. It is contended that the court acted in excess of its authority in making this order and thus committed error which was damaging to the defendant's rights.

"There is, so far as we know, no express provision of law authorizing the course adopted by the court, but every court has certain inherent power—power which, exercised within reasonable and proper limits, authorizes it to go beyond its express powers, where the interest of justice imperatively demands such a course. Moreover, by section 128, subdivision 5, of the Code of Civil Procedure, every court is in general language clothed with full control and power over every person connected with a judicial proceeding before it, in so far as said proceeding is concerned, and we fail to see in the action of a court compelling the production of any relevant and competent testimony which will make clear or tend to make clear the truth as to a disputed question of fact anything in contraven-

tion of either the letter or spirit of subdivision 5 of that section of our code.

"We perceive no distinction between the proposition here and the one presented and discussed in the case of *Johnston v. Southern Pacific Co.*, 150 Cal. 535, 540, where in an action for personal injuries the trial court was appealed to by the defendant for an order allowing the plaintiff to be examined as to her injuries and the effect thereof by physicians of the defendant's own choosing, testimony bearing upon that subject having been given by physicians who had been employed by and were introduced as witnesses for plaintiff. The court denied this application upon the ground that it had no power to make the order, and on appeal the Supreme Court held that the ruling was erroneous; that the court was authorized to make said order by virtue of the provisions . . . of the Code of Civil Procedure, and quotes approvingly from the case of *Wanek v. City of Winona*, 78 Minn. 98. . . .

"As stated, we see no difference in principle between the action of the court in the case at bar in ordering defendant to permit an expert witness for plaintiff to examine its machinery, and the order which the Supreme Court declares it was prejudicial error to refuse to make in *Johnston v. Southern Pacific Co.*, *supra*. . . .

"Our conclusion is that the court in no manner or degree transcended its power or authority in ordering defendant to allow plaintiff's expert to examine the machinery."

While it is true the California Statutes, sections 128-129, provided that "the court shall have power to control in furtherance of justice the conduct of its ministerial officers and of all persons in any manner connected with any judicial proceeding before it in every manner appertaining thereto," yet the court will see that the power conferred is merely declaratory of the power which our own circuit courts inherently have.

The inherent right of courts to make such an order was presented to the Supreme Court of the United States in the case of *Montana Co. v. St. Louis Mining Co.*, 152 U. S. 160, a case in which an order was made to inspect a mine. The court in holding that an order to allow such an inspection was proper, quoted the following with approval from *Thornburgh v. Savage Mining Co.*, 7 Morrison's Min. Rep. 667:

"That a court of equity, having jurisdiction of the subject-matter of the action, has the power to enforce an order of this kind will not be denied; and the propriety of exercising that power would seem to be clear, indeed, in a case where, without it, the trial would be a silly farce. Take as an illustration the case at bar. It is notorious that the facts by which this controversy must be determined cannot be discovered except by an inspection of works in the possession of the defendant, accessible only by means of a deep shaft and machinery operated by it. It would be a denial of justice, and utterly subversive of the objects for which courts were created for them to refuse to exert their power for the elucidation of the very truth—the issue between the parties. Can a court justly decide a cause without knowing the facts? And can it refuse to learn the facts?"

In the case of *Little Rock Gas & Fuel Co. v. Copledge*, 172 S. W. (Ark.) 885, the court held that it was discretionary with the trial court whether it should require the defendant, injured by escaping gas, to allow the gas company to experiment in the house as to the effect of the escaping gas.

In the case of *Byrd. Irr. Co. v. Smythe*, 146 S. W. (Tex. Civ. App.) 1064, it was held that a court of equity, by virtue of its ancillary powers, may grant orders for the inspection of property, where it is shown to be necessary for the proper exercise of judicial functions, or for the attainment of justice.

The question of trespass incident to carry out such an order is very ably discussed in the case of *Reynolds*

v. Fibre Co., 71 N. H. 332, where the court speaks as follows:

"The slight infringement of the right of property that is involved in an inspection of it under an order of a court of equity is justified by 'due process of law,' or 'the law of the land' and is in no sense a violation of the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.

"A consideration of the origin of the equitable remedy for discovery and of its nature and purpose leads to the conclusion that it may be employed to compel the production of personal chattels as well as books, deeds, letters and other documents for inspection and examination in aid of an action at law and the foregoing cases confirm this conclusion. . . . Justice requires that the plaintiff shall also have an opportunity to have the strap examined by persons in whose skill and scientific knowledge she has confidence. There cannot be a fair trial of the case unless such opportunity is given to the plaintiff. Indeed, it may be that she cannot establish her right—if she have one—without having the opportunity." [See also, *Bovill v. Moore*, 2 Coop. C. C. 56.]

The principle was also recognized in the case of *Henszey v. Coal Min. Co.*, 80 Fed. 178, and *Mutual Life Ins. Co. v. Griesa*, 156 Fed. 398.

This subject is thoroughly discussed by 3 Jones on Evidence, section 406.

In the case of *Mutual Ins. Co. v. Griesa*, supra, which was a bill in equity to cancel a policy of life insurance, the deceased was killed by falling from the roof of his house. The issue was whether he had taken morphine just previously, with intent to suicide thereby, and had deliberately thrown himself from the roof to conceal the suicide. The insurer applied for an order to exhume the body of the deceased. The order was granted by Judge McPHERSON, in an able and sensible opinion. The order directed the appointment of a

pathologist to examine for the effects of the fall and a chemist to examine for morphine. The opinion repudiates a privilege protecting from such disclosure.

The last-named case was a suit in equity to cancel the policy. A previous suit was brought at law on the policy where the executors were plaintiffs and the widow was not a party. The insurance company made application for an order to exhume the body. The court held there was an insurmountable objection to making the order in the law action because the widow was not before the court—she not being a party to the action cannot be made a party to the law action; she is a defendant to the action in equity; and that the widow has a control of the body of her deceased husband the executors do not have. In 3 Wigmore on Evidence, p. 2972, sec. 2194, and sec. 2221, will be found a discussion of the question here under consideration. He attempts to get at the underlying principles of the law, and the following conclusion is stated, after a consideration of the different decisions on this point:

“The courts can as well command a witness to let the jury, or qualified experts, inspect his premises, his chattels or his person as to produce his documents. It is not to be supposed that our courts will finally commit themselves to the denial of such a plain dictate of principle and of common sense.”

In section 2221, the following will be found:

“The testimonial duty of witnesses in general requires the disclosure of facts in any and every feasible form, including such evidence as is available through inspection of the witness’s premises and chattels, either by the tribunal itself, or by other witnesses under order of the court. There is no reason why a party should be privileged more than other persons in this respect. Not only as in the case of corporal exhibition is the absence of such a privilege deducible by implication from the statute making parties compellable generally, but also it may be maintained that no privilege in this respect was ever established at common law.”

From an early day this court has uniformly held that in personal injury cases the circuit court has the power, not absolute, but in its discretion, to have the plaintiff's injuries examined by physicians, so that they may testify as to their character and extent, and that such discretion will not be interfered with unless manifestly abused. [Shepard v. Mo. Pac. Ry. Co., 85 Mo. 629; Sidekum v. W., St. L. & P. Ry. Co., 93 Mo. 400; Owens v. K. C., St. J. & C. B. Ry. Co., 95 Mo. 169.]

From the foregoing authorities the following legal deductions may be properly drawn.

First: That the *nisi prius* courts of England having possessed the inherent authority to make and enforce orders similar in character to the one here involved, and our circuit courts being courts of original and general jurisdiction, fashioned, as to jurisdiction and procedure, by the adoption of the common law, after the English courts, they likewise must have the same inherent authority to make and enforce such orders.

Second: That neither the Constitution of the United States nor that of this State was designed to destroy that inherent power of said courts, but was intended to limit and regulate that authority to reasonable search and seizures and thereby abolish the power of the courts to exercise their jurisdiction as instruments of injustice and oppression of the people of the State and Nation.

Third: That said constitutional provisions likewise limited the authority of the lawmaking powers of the country to enact laws providing for reasonable search and seizure of persons and property, which may also regulate the authority of the courts in that regard, but cannot abolish that authority.

Fourth: That under the common law and the constitutional provisions mentioned, said power of the courts equally applies to persons and property.

Fifth: That in this State it is no longer an open question that the circuit courts have the power to order the person of a plaintiff examined, to enable experts to testify as to the character and extent of his injuries.

Bearing these legal propositions in mind and recalling the fact that the law requires the employer to furnish the employee a reasonably safe place in which to work and reasonably safe appliances with which to labor, the violation of either of which results in his injury, the law, in order to do justice between the parties, must either impose an implied agreement on the part of the employer, arising out of the contract of the employment, that in case the former should be injured by the failure of the latter to furnish him with such a place or instrumentalities, the plaintiff might have the right, at a proper time, and in a reasonable manner, in company with proper persons, to visit and inspect said place and appliances, in order to enable them to testify as to their character and condition; or the law should, upon the other hand, in such a case, in the first instance, impose the duty upon the master to expose to plaintiff, and his experts, at a proper time and in a reasonable manner, the place where and the instruments with which he was injured, as a legal corollary to the duty the employee owes to the employer, in a suit for personal injuries, to expose his injuries to the inspection of physicians or other experts selected by the defendant or court, as previously stated.

Both of these powers are inherent in the courts, and are recognized by the State and Federal Constitution, limited, however, to reasonable search, inspection and seizure. No one at this late day questions the power of the circuit court to order the injuries of a plaintiff complained of, in a damage suit, to be examined by physicians so that they may testify to the character and extent of those injuries, and for stronger reasons the power of the court to make and enforce an order of the character here complained of, should go unchallenged, because one's person and his personal

rights have under all laws, human and divine, been held more sacred, in higher esteem, better shielded and protected than mere property and property rights; so if the defendant in this case is entitled to have the plaintiff's injuries examined by experts, as previously stated, then *a fortiori* the plaintiff should be entitled to have experts examine the premises and machinery mentioned in this case.

We are therefore of the opinion that the circuit court had the power to make and enforce the order complained of, and that the same is just and reasonable, and in no manner injures or oppresses the relator.

The temporary writ heretofore issued from this court is quashed, and this proceeding is dismissed.

All concur, *Bond, J.*, in result only.

THE STATE ex rel. M. E. RHODES v. PUBLIC SERVICE COMMISSION and CHICAGO & ALTON RAILROAD COMPANY, Appellants.

In Banc, April 9, 1917.

1. **RAILROAD RATES: Power of Public Service Commission.** Section 47 of the Public Service Commission Act, Laws 1913, p. 583, confers upon the Commission authority to raise railroad rates above the maximum theretofore fixed by the Legislature.
2. ———: **General Powers of Legislature.** The General Assembly may pass any law upon any subject not forbidden by the organic law. That power is conferred by section 1 of article 4 of the Constitution, which says that "the legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'the General Assembly of the State of Missouri.'" Pursuant to this general power to enact legislation, the General Assembly had enacted laws fixing maximum passenger and freight charges prior to the incorporation of section 14 of article 12 in the Constitution of 1875 which explicitly conferred the power of "establishing reasonable maximum rates." [Explaining statement in *State v. M. K. & T. Ry. Co.*, 262 Mo. 1. c. 522.]

State ex rel. v. Pub. Serv. Comm.

3. ———: **Railroad Rates: Power of Legislature.** The General Assembly has power to fix reasonable maximum rates for the carriage of freight and passengers, in the absence of any specific authority such as is contained in section 14 of article 12 of the Constitution explicitly conferring the power.
4. ———: ———: ———: **Delegation of Power.** The power of prescribing maximum rates for common carriers, which the Legislature inherently possesses, may be delegated to a railroad commission or to a public service commission, unless inhibited by express constitutional provision. And if the fixing of rates is to proceed intelligently along lines of fairness to all concerned—to passenger, shipper, carrier, laborer and the public—with due regard to constant mutations in costs of labor and the amount of traffic, the matter should be delegated to a body having time for investigation and aided by expert machinery and having greater flexibility than a short-term Legislature possesses.
5. ———: ———: ———: **Constitutional.** Although by doing so it repealed existing statutes fixing maximum rates, the Legislature was not inhibited by the provision of the Constitution declaring that “the General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in the State, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads” from creating the Public Service Commission and directing it, after a hearing and proper expert investigation, to ascertain what maximum rates are reasonable and fix the same by an order, and declaring that said rates so ascertained and fixed should “thereafter be observed” by the railroads. The Legislature did not thereby delegate to the Commission the absolute power of fixing maximum rates, but only the power to ascertain and determine what rates are reasonable, and it is those rates that the General Assembly “established”—subject all the time to review by the courts as to their reasonableness.

Held, by BOND, J., dissenting, that since the General Assembly did exercise its exclusive power to establish and fix maximum rates, it could not thereafter exercise it again except through the medium of its own power as a legislative body; and since the Constitution says that the General Assembly shall establish maximum rates, it was powerless to delegate the power to any commission, and to do so is to contravene this constitutional provision.

Appeal from Cole Circuit Court.—*Hon. J. G. Slate*,
Judge.

REVERSED AND REMANDED (*with directions*).

Alex. Z. Patterson and James D. Lindsay for appellant Public Service Commission.

(1) Section 14 of article 12 of the Constitution was appropriated by our Constitutional Convention of 1875 from the Illinois Constitution, adopted in 1870. Sec. 12, art. 11, Constitution of Illinois; *McGrew v. Mo. Pac. Ry. Co.*, 230 Mo. 518. (2) Prior to the adoption of section 14 of article 12, the Legislature of the State of Illinois had directly and explicitly, by enactment, delegated to the Board of Railroad and Warehouse Commissioners of that State the power to establish "schedules of reasonable maximum rates of charges" for railroad transportation. Such enactment was subsequent to the adoption of the Illinois constitutional provision, and must be regarded as the legislative construction of the State of Illinois of her Constitutional provision. Act of May 2, 1873, R. S. Ill., chap. 114, p. 951, secs. 124, 133; *C., B. & Q. R. Co. v. Jones*, 149 Ill. 361. (3) Legislative construction of a constitutional provision that is subsequently adopted by another State is regarded as high and convincing authority by the adopting State. *Langdon v. Applegate*, 5 Ind. 327; *McGrew v. Mo. Pac. Ry. Co.*, 230 Mo. 496. (4) The rule in adopting, with borrowed constitutional provisions and statutes, their constructions, is manifestly just and right; for if it were intended to exclude any known constructions of such provisions or statutes, the necessary presumption is that their terms would be so changed when they are adopted as to effect that intention. *McGrew v. Mo. Pac. Ry. Co.*, 230 Mo. 519; *Myrick v. Hasey*, 27 Mo. 9; *Com. v. Hartnett*, 3 Gray (Mass.), 450; *Pennock v. Dialogue*, 2 Pet. (U. S.) 1; *Hogg v. Emerson*, 6 How. (U. S.) 483. (5) The court of last resort of the State of Illinois has held, subsequent to our adoption of its constitutional provision of 1870, that the Act of the Legislature of 1873 of that State delegating the rate-making function to the Railroad and Warehouse Commission, was not an unconstitutional dele-

gation of legislative power. And such decision was rendered after a definite and particular consideration of section 12 of article 11 of the Illinois Constitution, corresponding to our constitutional provision. Such holding, though subsequent to our adoption of the Illinois constitutional provision is entitled to great weight as persuasive authority. *C., B. & Q. R. Co. v. Jones*, 149 Ill. 361. (6) Delegation of rate-making power by the Legislature to proper administrative boards or commissions is approved by the courts as the most equitable, suitable and fair means of regulating the charges of railroad corporations. *Reagen v. Loan & Trust Co.*, 154 U. S. 362; *R. R. Commission Cases*, 116 U. S. 307; *Tilley v. Railroad Co.*, 5 Fed. 641; *Railroad v. Dey*, 35 Fed. 866; *Railroad v. Smith*, 70 Ga. 694; *Express Co. v. Railroad*, 111 N. C. 472; *McWhirter v. Railroad*, 24 Fla. 471; *Noyles on American R. R. Rates*, pp. 206, 207; *State ex rel. v. Public Service Comm.*, 259 Mo. 726.

Scarritt, Scarritt, Jones & Miller for appellant Chicago & Alton Railroad Company.

(1) The issue in this case has been previously ruled by this court. *State ex rel. v. Public Service Commission*, 259 Mo. 704. (2) There is no merit in relator's contention that section 14, article 12, of the Constitution of Missouri was not called to the attention of this court, or considered by this court in reaching their judgment in the case of *State ex rel. v. Public Service Commission*. (3) The claim of relator that section 14 of article 12 of the Constitution restricts and incapacitates the Legislature from establishing reasonable maximum rates for railroads by and through such a public service commission as ours, and that the rates when so established will not supersede prior maximum rates fixed by the Legislature, is not supported by reason or precedent. The evident purpose of the people of Missouri through these constitutional provisions was to have laws enacted which should prevent unjust discriminations and ex-

tortions in the rates of railroads, and to correct abuses in the operation of railroads, and to allow reasonable rates to be charged and collected by railroads, and to prevent special and exclusive privileges either through unauthorized customs or through special laws, and to prevent discriminations or preferences in the rates charged or facilities furnished, and to prevent railroads from showing favoritism by charging more for a shorter than for a longer haul. The main purpose appears to be to bring about the enactment of such laws as are here indicated—to stir the legislative body into action—and not to limit the grant of legislative authority expressed in article 3 and section 1 of article 4 of the same document. This Public Service Commission law declares that rates shall be just and reasonable and not discriminatory, and reasonably leaves to a duly constituted commission the province of investigating and determining what are unreasonable charges and what are discriminatory practices and what this or that railroad should do reasonably to accommodate traffic. And so the Legislature has established that law and has wisely committed to an administrative body the functions of enforcing it. This statute cannot be said to be a delegation of a law-making power vested in the Legislature. It is more properly referred to as one referring the matter of administration duly established by a valid statute to an administrative commission to carry its wise provisions into effect. *State ex inf. v. Gas Co.*, 254 Mo. 515; *State ex rel. v. Public Service Comm.*, 259 Mo. 704. (4) That the State of Missouri by a duly enacted statute may delegate to the Public Service Commission the power to regulate and control railroads and other public utilities within the State is settled beyond all question in this State. *State ex inf. v. Gas Co.*, 254 Mo. 515; *State ex rel. v. Public Service Comm.*, 259 Mo. 704. A State in the exercise of its police power can, as an attribute of sovereignty, without any constitutional provision granting that power, regu-

late the business and fix the rates of its domestic utilities, either directly through an act of its Legislature or through such a commission as the Public Service Commission, unless there be an express restriction of general legislative authority so to do in the State Constitution. Non-action of the Legislature cannot confer power to delegate. It seems to be generally conceded even by our opponents, that if the Legislature had not established a maximum statutory rate, then the Commission could do so. If the power cannot be delegated by the Legislature, how can a failure of the Legislature to establish maximum statutory rates confer the power on the Legislature to delegate to the Commission? Can such a position be logical? The question answers itself in the negative. *Chicago, B. & Q. R. Co. v. Cutts*, 94 U. S. 155; *State ex rel. Public Service Commission v. Baltimore & Ohio R. R. Co.*, 85 S. E. 714; *State ex rel. Great Northern R. R. Co. v. Railroad Commission*, 52 Wash. 33; *Chicago, B. & Q. R. Co. v. Jones*, 149 Ill. 361; *Georgia Railroad Co. v. Smith*, 70 Ga. 694; *Tilley v. Savannah R. Co. et al.*, 5 Fed. 641; *Railroad Commission v. Central of Georgia*, 170 Fed. 225.

M. E. Rhodes for respondent.

(1) Section 1, article 4, of the Constitution provides: "The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled the General Assembly of the State of Missouri." Respondent contends the power thus conferred must be exercised by the General Assembly alone, and that the General Assembly cannot delegate such power to any other body or branch of government. *State v. Field*, 17 Mo. 529; *Owen v. Baer*, 154 Mo. 505; *Merchants' Exchange v. Knott*, 212 Mo. 641; *State ex inf. v. Carlisle*, 235 Mo. 259; *State to use v. Cochrane*, 264 Mo. 591. That a legislative power cannot be exercised by any other authority than the legislative department of the government is fully sustained by the following authorities from other jurisdictions: *State v. Railway Co.*, 100

Minn. 445; Valley v. Park Comrs., 16 N. D. 25; People v. Election Comrs., 221 Ill. 9; Noell v. People, 187 Ill. 587; Mitchell v. State, 134 Ala. 392; Fite v. State, 114 Tenn. 646; In re Incorporation of Milwaukee, 93 Wis. 616; Hovey v. Comrs., 56 Kan. 577; State v. Johnson, 61 Kan. 603; Harbor Comrs. v. Railroad, 88 Cal. 491; Ex parte Cox, 63 Cal. 21; Boyd v. Bryant, 39 Ark. 69; Nall v. Kelly, 179 S. W. 486; Commonwealth v. Adams, 95 Ky. 586; Trustees v. Webb, 71 S. E. 520; Marryman v. Banking Board, 111 Pac. 295; 2 Wyman on Pub. Service Corp., sec. 1404; Reeder, Rate Regulations, sec. 38; Cooley, Const. Lim. (6 Ed.), 137; 6 Am. & Eng. Ency. Law (2 Ed.), p. 1020; United States v. Grimaud, 220 U. S. 506; Light v. United States, 220 U. S. 523; Interstate Com. Comm. v. Transit Co., 224 U. S. 194. (2) Section 47 of the Public Service Commission Act provided: "Whenever the Commission shall be of opinion . . . that the maximum rates, fares or charges, chargeable by any such common carrier, railroad corporation or street railroad corporation are insufficient to yield reasonable compensation for the service rendered and are unjust and unreasonable, the Commission shall, with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed." The power thus conferred is purely administrative, and it has been so held on the admission of counsel for the Commission. State ex rel. v. Public

Service Commission, 259 Mo. 727. (See brief for respondent in the same case.) It is said in the case above cited that the Public Service Commission Act is referable to the police powers of the State (l. c. 712). Such powers must be exercised by the Legislature and cannot be delegated. (3) If the authority conferred upon the Public Service Commission to increase rates, "notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute," is limited to an increase only where the railroad company is charging less than "has been heretofore authorized by statute," then the act is constitutional. If, on the other hand, the authority to increase rates is not thus limited, and the Commission is given power to increase rates above the maximum established by statute, the act is in conflict with section 1, article 4 and section 14, article 12 of the Constitution as being a delegation of legislative power, it is, therefore unconstitutional. (4) If a statute is susceptible of a construction that makes it obnoxious to the Constitution and also to one in harmony with its provisions, the latter construction must be adopted. State ex rel. v. Pike County, 144 Mo. 275; Ex parte Loving, 178 Mo. 203; State v. Moody, 202 Mo. 127. A construction of the act limiting the authority of the Public Service Commission to increase rates only in case where a lower rate is charged than fixed by law, and that such rates should not exceed the maximum rates established, makes the statute constitutional. The maxim, *Expressio unius est exclusio alterius*, applies, for the express mention of the conditions under which the Commission may increase rates, implies the exclusion of all other conditions.

FARIS, J.—This is an appeal from the circuit court of Cole County in a proceeding by *certiorari*, to bring up to that court the record of the Public Service Commission in a certain cause wherein some four-

teen railroads doing business in Missouri sought by an application to said Public Service Commission to obtain an increase in intrastate freight and passenger rates. The Public Service Commission (hereinafter, for brevity called the Commission), which is one of the appellants herein, granted some part of the relief prayed for; whereupon the relator, a citizen of Missouri, and a potential patron of the railroads of this State, brought the case up to the Cole Circuit Court by a so-called writ of review. This latter court reversed the finding of the Commission, and from such judgment of reversal the Commission, and the component individual members thereof, and the Chicago, & Alton Railroad Company have appealed.

The facts necessary to an understanding of the case are few and simple, and touching such facts as will serve to make clear the law points we find it necessary to discuss there is no dispute.

Historically and chronologically the facts as to the legislation which will come under review and the years of the passage thereof run thus:

In 1905 an act was passed by the Legislature establishing freight rates in this State. This act was amended in 1907.

There was also passed in 1907 an act fixing the intrastate passenger rates at two cents per mile per person upon the railroads which are parties to this application.

In 1913 there was passed by the Legislature the Public Service Commission Act, which act contained, among other provisions, a section designated as section 47, which it is averred conferred upon appellant Commission the power and duty of ascertaining and establishing reasonable maximum rates for the carriage of persons and freight in intrastate traffic upon the railroads in this State. More extended references to these several acts will be made hereinafter.

Pursuant to the power which the appellants urge was lodged in the Commission by said section 47,

appellant railroad and thirteen other railroads made on September 15, 1914, as stated, an application praying for the revision upwards of freight and passenger rates. After a comprehensive investigation by their rate experts and expert accountants and engineers, exhaustively and diligently carried on for more than a year, the Commission made its finding and entered orders granting to appellant Railroad Company and to the other common carriers named in the application for an increase of rates, certain modified measures of relief to take effect January 1, 1916. This finding, so far as the extent of our review here is concerned, is sufficiently set forth by appellant Commission in the below quoted language of their report and finding, to-wit:

“We conclude that the applicants herein are entitled to a measure of relief, but not to the extent of the rates as proposed by applicants. Therefore, an order in conformity with the views expressed herein should be entered fixing the reasonable rates, fares and charges for passenger service and commodity rates and charges for freight service to be in effect as maximum rates for the services to be performed for a period of twelve months from January 1, 1916, and thereafter until changed or abrogated by the Commission.”

Thereafter in the Commission's order followed specifications of the reasonable maximum rates fixed by the Commission and to be charged by the several classes of railroads on divers commodities of merchandise, as well as an order fixing a maximum passenger rate per person per mile upon intrastate traffic upon the several classes of railroads; and orders requiring the issuance of round-trip tickets at two and a fourth cents; five-hundred-mile books, usable by bearer and persons for whom presented, and joint interchangeable thousand-mile books likewise usable by bearer and persons for whom presented, at two cents per mile. As stated, with the details of these matters and rates, we have here nothing to do; for the whole case

turns upon the question whether said section 47 conferred on the Commission under the Constitution the power and authority to make or fix reasonable maximum intrastate rates for the carriage of freight and passengers in this State.

If other facts shall become necessary in order to make clear the law points involved, these facts will be found set out in our opinion.

For convenience of expression we shall in setting forth our views speak of *delegating* the power of legislating to the Commission, while laboring to show that what has been done is either no delegation of power at all, or that it is a delegation which is beneficent and permissible and not forbidden.

I. The only questions in this case are questions of cold law. The stipulation filed so limits them and the points briefed by learned counsel upon both sides do the like. So as a limiting foreword we may observe that we approach their determination with-
Matters Excluded. out any hampering compunctions touching whether the orders made by the Commission are upon the facts warranted or unwarranted, just or unjust, or whether as contended, the practical carrying out of these orders will prove so meagre in increase of income and so burdensome in accounting as to make actual defeat for the carriers out of seeming victory.

The Legislature has acted by passing the Public Service Commission Act, containing among other provisions section 47, which delegated, it is contended upon one side and denied upon the other, the whole matter of railroad rate-making to the Commission, and its constitutional power to do this (if it did it) is here the bone of contention. The Commission has acted pursuant to its interpretation of the powers conferred upon it by the section *supra*. Within their respective legal spheres both the Legislative and the administrative branches have, it is contended and

denied, done what the law enjoins. It is our sole duty therefore as the other co-ordinate branch of government to see whether the legislative branch and the executive, or administrative, branch had the power to do what they have done. In short, we have nothing whatever to do with the facts, or the public policy involved, or with the inherent correctness, or incorrectness of the orders made; *it is alone our duty herein to deal with the power of the Legislature under the Constitution to pass section 47 and to interpret and construe its meaning and effect*, if it is valid under the Constitution. Therefore, it follows that concretely stated, the two questions involved are pure questions of law and they are: (a) Does section 47 (Laws 1913, p. 583) of the Public Service Commission Act confer authority upon the Commission to raise railroad rates above the maximum fixed by the Legislature? (b) If said section 47 has this effect, is it invalid because in violation of the provisions of section 14 of article 12 of the Constitution?

II. Taking these questions in their order and discussing them without noticing the phase of interdependence, we conclude that section 47 does confer this identical power upon the Commission. The pertinent portions of said section 47 read thus:

Power
to fix
Rates
Conferred.

“Whenever the commission shall be of opinion, after a hearing had upon its own motion or upon complaint, . . . that the maximum rates, fares or charges, chargeable by any such common carrier, railroad corporation or street railroad corporation are insufficient to yield reasonable compensation for the service rendered, and are unjust and unreasonable, the commission shall with due regard among other things to a reasonable average return upon the value of the property actually used in the public service and to the necessity of making reservation out of income for surplus and contingencies, determine the

just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum to be charged for the service to be performed, notwithstanding that a higher rate, fare or charge has been heretofore authorized by statute, and shall fix the same by order to be served upon all common carriers, railroad corporations or street railroad corporations by whom such rates, fares and charges are thereafter to be observed." [Laws 1913, p. 583.]

We may observe as a foreword that: The Constitution of Missouri is a limitation upon the powers of the General Assembly, which body may therefore pass any law upon any subject not forbidden by our organic law, or by the Federal Constitution (Ex parte Roberts, 166 Mo. 1. c. 212; Railroad v. Otoe County, 16 Wall. 667), and there is no question here of the Federal Constitution. This power is conferred by section 1 of article 4 of the Constitution of 1875, which says: "The legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'the General Assembly of the State of Missouri.'" [Cf. Sec. 1, art. 3, Constitution 1820; Sec. 1, art. 4, Constitution 1865.] Pursuant to this general power of enacting legislation, and long prior to the adoption of section 14 of article 12 of the Constitution of 1875 (which appeared for the first time in the Constitution of 1875), the General Assembly of this State had passed laws for the regulation of railroads and fixing maximum rates for the transportation of passengers at four cents a mile (Laws 1863-4, sec. 2, p. 48), and in a loose and general way fixing the maximum freight rates for the carriage of different classes of commodities, subject, however, *to classification by the railroads themselves*. [Laws 1863-4, sec. 3, p. 48.] This act was amended in 1865, among other ways by increasing the maximum rate per passenger per mile to six cents. [Secs. 30 and 31, p. 340 et seq., G. S. 1865.] In 1875, but prior to the adoption of our express

constitutional provision (Sec. 14, art. 12, Constitution 1875) explicitly conferring upon the Legislature the power of "*establishing reasonable maximum rates*," the Legislature for the first time passed an act, both *fixing* maximum freight and passenger rates and *dividing* the railroads of the State, as well as divers commodities of commerce into classes. [Laws 1875, p. 112 et seq.] Here then are three instances of legislation fixing maximum rates, some of them long prior to the adoption of the express constitutional provision here under discussion. [Sec. 14, art. 12, Constitution 1875.]

In passing, we may here fitly observe that the statement loosely made by the writer *arguendo* in State v. Missouri, Kansas & Texas Ry. Co., 262 Mo. l. c. 522, that "the only constitutional power to establish a reasonable maximum rate of charge for such service comes from said section 14 of the Constitution," was to an extent inaccurate. What was there meant was that said section contains the only express language of our Constitution conferring this power. The statement was *obiter* loosely made in discussing *arguendo* whether a rate made pursuant thereto was a legislative determination of the reasonableness of such rate within the purview of other provisions of said section 12 of the Constitution which forbids unjust discrimination.

Which brings us as a corollary to the question whether the effect of the passage *inter alia* of section 47, supra, of the Public Service Commission Act, was to repeal conditionally the freight regulation act of 1905 (Laws 1905, p. 102), as amended in 1907 (Laws 1907, p. 171 et seq.), and the passenger rate act of 1907 (Laws 1907, p. 170). This matter has so recently been examined and so ably and exhaustively treated by LAMM, C. J., in the case of State ex rel. Missouri Southern Railroad Co. v. Public Service Commission, 259 Mo. l. c. 728, a case In Banc, in which the whole court concurred, that further exposition would but cumber the books. In that case our

learned former colleague said, and we all concurred in this, to-wit:

“In so far as elder statutes undertook to make hard-and-fast rates, charges that might be lowered but not raised so as to conform with ‘reasonable compensation,’ or ‘reasonable average return on the value of the property actually used in the public service’ by the corporation, it must be held they were inconsistent and in conflict with the Utilities Act in those particulars and stand modified by the later act when the facts warrant, which later act, under canonized rules of construction, and as a younger act covering the field, must control. It is not necessary for us to hold that all statutory rate provisions were *eo instante* and *ipso facto*, repealed. It is sufficient for us to hold and we do hold that the Legislature could delegate to the Commission, as an administrative body, the power to ascertain facts warranting a readjustment of rates in accordance with the general statutory rules announced by the lawmaker (as is the case here), and that when such rate was so ascertained the modification of rates contemplated by the statute might take effect under the orders of the Commission despite the elder statutes. This leaves statutory maximum rates in force until facts established before the Commission call into play the modifications contemplated by the Utilities Act. In no other way can the statute be given vigor and be made a complete and rounded scheme adjusting itself to meet the form and pressure of the facts in each particular case and subserving right ends. If the result reached aids a crippled and distressed public service corporation on the one hand in a given case, or, a distressed and harrassed public on the other in another given case, then, in either event, justice is done. It cannot be expected that this court will take color from corporate prejudice, if such exists. It ought not to be expected that through fear of popular disfavor we would coyly toy with a situation. If there are nettles to be handled the right

plan is to grasp them with a firm hand. The sting is less. We sit here, as we see it (and take leave to say so) to administer justice to individual and corporation, those in power and those out, the weak, the strong, the high, the low, indifferently, peradventure fearing none and fawning on none. The claim so made for ourselves we accord unstintingly to the Honorable Public Service Commission of the State of Missouri. To that end the Commission should set aside their order dismissing the complaint, reinstate the proceedings, set a day and place for a hearing and proceed to take the proofs to the end that the matter may be disposed of as the facts warrant."

After again examining with infinite care the section under discussion, we are unable to detect any error in our former ruling, as to the bare effect upon existing rate-fixing statutes of the passage of the later law as contained in section 47, *supra*. Indeed, as Judge LAMM very broadly intimates, if we are to have, or retain in its integrity any law at all regulating public utilities, any other view or construction of the above section would be shocking in its inequities and unfairness. Pertinently, on this very point Judge LAMM, at page 725 of the case of *State ex rel. Missouri Southern Railroad Co. v. Public Service Commission*, *supra*, said:

"We take it that a decent respect for the Legislature precludes the theory that the Commission was given control of expenditures and denied control of income, the two being inseparable in the very nature of things. Moreover, it precludes the theory the Commission was given power to ascertain a just rate and then (wonderful to relate) was denied power to enforce it—that prior legislation controlled the rate, while the Commission controlled the outgo, thereby providing an upper and nether millstone with the corporation between. Therefore it follows that, if the hand of the Legislature by former acts was so laid on rates that no power existed to increase a

hard-and-fast maximum general statutory rate (established to cover all cases and arrived at by legislative guess, however intelligent the guess may be, as seems to be the case at the time the Utilities Act was passed), the conclusion is irresistible that the Legislature intended its hand should be lifted and that by general rules and methods prescribed for the guidance of the commission, as here, it was intended that it first ascertain the facts and next should apply them in regulating rates, up or down."

III. The question of the right of a Legislature to fix reasonable maximum rates for the carriage of freight and passengers, absent *any specific authority* such as is contained in section 14 of article 12 of our Constitution, is too well settled in this State and in all other jurisdictions for either cavil or dispute. [Granger Cases, 94 U. S. 113-187; Saratoga Springs v. Saratoga Light & Power Co., 191 N. Y. 123; Reagan v. Farmers' Loan & Trust Co., 154 U. S. 362; Southern Ind. Ry. v. Railroad Commission, 172 Ind. 113; Railroad Commission Cases, 116 U. S. 307; Tilley v. Railroad, 5 Fed. 641; Stone v. Farmers' Loan & Trust Co., 116 U. S. 407; Dow v. Beidelman, 125 U. S. 680; Georgia Banking Co. v. Smith, 128 U. S. 174; Interstate Com. Com. v. Railroad, 167 U. S. 479; Chicago, B. & Q. R. R. Co. v. Iowa, 94 U. S. 155; Munn v. Illinois, 94 U. S. 113; McWhorter v. Pensacola & Atl. R. R. Co., 24 Fla. 417; State v. Atlantic Coast Line Ry. Co., 47 So. 969; Chicago, B. & Q. R. R. Co. v. Jones, 149 Ill. 361; Budd v. New York, 143 U. S. 517; State ex rel. v. Johnson, 61 Kan. 803; Stone v. Yazoo & M. V. R. R. Co., 62 Miss. 607; Atlantic Express Co. v. Railroad, 111 N. C. 463; Ruggles v. Illinois, 91 Ill. 256, 108 U. S. 526; Winchester & S. R. R. Co. v. Commission, 106 Va. 264.] While many of the above are cases wherein the question of the delegation of the power to a commission to regulate and to fix maximum rates was

chiefly in dispute, they are nevertheless in point here, for the simple reason that unless the Legislature itself possessed the power of fixing maximum rates, it is manifest it could not delegate any part of this power to a railroad commission, or to a public service commission. [Wayman v. Southard, 10 Wheat. 1; Minneapolis, St. P. & S. S. M. Ry. Co. v. Railroad Commission, 136 Wis. 146.]

IV. It is also settled beyond doubt or cavil that this power of prescribing maximum rates for common carriers, which as we have seen legislatures possess pursuant to an untrammelled grant of the power to pass laws, may be delegated to a railroad commission or to a public service commission. To this rule, unless inhibited by express constitutional provision, there is not a reputable exception. These cases among many others which industry will uncover, so hold: State ex rel. Missouri Southern R. R. Co. v. Public Service Com., 259 Mo. 704; Chicago, B. & Q. R. R. Co. v. Jones, 149 Ill. 361; Kimbrell v. Louisville & Nashville Ry. Co., 67 So. 586; Intermountain Rate Cases, 234 U. S. 476; Louisville & Nashville Ry. Co. v. Interstate Commerce Com., 184 Fed. 118; Michigan Central R. R. Co. v. Railroad Com., 160 Mich. 355; Southern Indiana Ry. Co. v. Railroad Com., 172 Ind. 113; Atlantic Coast Line R. R. Co. v. North Carolina Corp. Com., 206 U. S. 1. c. 19; State ex rel. v. Missouri Pac. Ry. Co., 76 Kan. 467; Chicago & N. W. Ry. Co., v. Dey, 35 Fed. 866; Georgia Railroad v. Smith, 70 Ga. 694; Louisville & N. Ry. Co. v. Garrett, 231 U. S. 298; State ex rel. v. Chicago, M. & St. P. Ry. Co., 38 Minn. 281; State v. Railroad, 22 Neb. 313; State v. Atlantic Coast Line Ry. Co., 56 Fla. 617; Stone v. Wisconsin, 94 U. S. 181; Atlantic Express Co. v. Railroad, 111 N. C. 463; Railroad Comm. v. Atlantic Coast Line Rd., 71 S. C. 130; 4 R. C. L. 620; 8 Cyc. 834.]

Speaking of the now recognized universality of the above rule in all jurisdictions, Mr. Justice (now

Mr. Chief Justice) WHITE, in the case of Atlantic Coast Line Ry. Co. v. North Carolina Corporation Com., supra, at page 19, said:

“The elementary proposition that railroads from the public nature of the business by them carried on and the interest which the public have in their operation are subject, as to their State business, to State regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned in view of the long line of authorities sustaining that doctrine.”

So again we say that he reads the cases in vain who does not concede the authority of the Legislature, absent an express constitutional provision which forbids, to delegate to an administrative body the power to fix rates for the carriage of freight and passengers. In practice no more fair and feasible plan can be devised than to delegate this difficult and most technical duty to a board which is perpetually in session and furnished with skilled accountants and experts. The situation as to common carriers changes from year to year; sometimes even from month to month. A fixed, hard-and-fast rate made one year might be almost confiscatory next year; or conversely, the rate fixed might become far greater than the service rendered is worth. No legislature has the time, nor is it equipped with the machinery necessary to investigate matters of rate-making in any manner which will serve to prevent its enactment of laws fixing alleged “reasonable maximum rates” from being other than a mere guess. That often it may guess right, can not serve as an apology for the multitude of cases wherein its conceded good intentions may not save it from guessing wrong. In the very nature of things a right guess would be accidental. If the fixing of rates is to proceed intelligently along lines of fairness and justness to all concerned—to capital and labor, passenger and shipper—having due regard to

the constant mutations in the cost of labor and materials; to the differences in density of population and therefore in number of passengers and amount of freight; to cost of building and operation and maintenance of the roads in the more level and populous parts of the State as compared to similar over-head costs in the rough and mountainous and sparsely settled parts; to bringing about a condition which will encourage, or even permit, areas not now served, but needing service to be served by new roads yet to be built; and to periods of great commercial prosperity as compared to periods of commercial depression, it is manifest that the matter must be committed to some body having greater flexibility in procedure; having more time for investigation and having at hand more expert machinery to the end in view than any earthly Legislature possesses. Peculiarly are these general observations applicable to our own Legislature, which is limited by the Constitution to seventy-day sessions, and likewise in its authority to provide compensation to its employees. [Sec. 16, art. 4, Constitution 1875.]

V. There is left in the case the single question whether said section 47 is constitutional, upon the view taken by us In Banc of the effect of the passage of said section 47 upon formerly enacted reasonable maximum freight and passenger rates: That it repealed or suspended said rates as, and to the extent said by LAMM, C. J., in the case and excerpt above. Does it become upon our placing this construction on it unconstitutional for that it runs in the face of section 14 of article 12 of the Constitution?

Learned counsel for respondent strenuously insists that if it is to be construed as permitting the Commission in cases of deemed necessity, to raise any freight or passenger rate above the maximum rates fixed by the said acts of 1905 (as amended in 1907) and the act of 1907, then it can not stand.

**Constitutionality
of Delegating
Statute.**

This is the sole point left alive in the case. Approaching it, we concede that while examined from well-nigh every other angle by our former colleague Judge LAMM, he did not pass specifically upon the point of constitutionality. A bare reference to the reported case discloses this. We need not consider whether, as learned counsel for appellants urge, the learned jurist who wrote the Missouri Southern case had the constitutionality of this section in mind, or whether it was possible for him to rule the case as he did unless he antecedently, but *sub silentio*, determined in his own mind the identical constitutional question here involved. Therefore, while this question is whether said section 47 is a prohibited delegation of legislative power to an administrative body, and while Judge Lamm held that the power to determine reasonable maximum rates is, in the mode adopted therein, delegable to the Commission, yet that learned jurist did not specifically examine or consider this question of delegability in the light of the express provision of our Constitution. So, we will look at this point as a question of first impression.

Succinctly stated, LAMM, C. J., held, *inter alia*, in the Missouri Southern case, (a) that section 47 of the Public Service Commission Act is by broad implication a conditional repeal of older statutes fixing maximum railroad rates, and (b) that said section conferred authority upon the Commission to raise railroad rates conditionally, above the maximum fixed by the Legislature in such older statutes, if found necessary for that such rates were unreasonable, after a hearing upon the question; such hearing to be dominated by the incumbent statutory obligation to afford the carrier a reasonable average return upon the property actually employed by it in the public service. Upon such construction is section 47 unconstitutional? We think not. Construed as learned counsel for respondent contends, clearly it is not. For if it confers power to lower rates, but not to

raise them, no possible question of invalidity arising from said section 14 of article 12 of the Constitution could be for a moment maintained, however close such a point might come to the clause of the Federal Constitution forbidding the taking of property without due process of law and forbidding upon legal principles which are germane, the establishing by law of a rate which is confiscatory. Because, to travel afield for a moment, if power be given, as power is given by numerous other sections of this act, to compel the making of costly betterments of all sorts and kinds and no provision be made, or is to be found in the act whereby revenue may be obtained to meet the cost of such enforced betterments, it is clear that there lacks but proof of the single fact of financial inability at the fixed rate, to render a statute conferring power to compel the making of betterments absolutely invalid, because confiscatory. [State ex rel. Missouri Southern R. R. Co. v. Public Service Com., *supra*.]

There are seven states having constitutions which contain provisions wholly similar, or similar in all material substance to the provisions of said section 14 of article 12 of our Constitution, which for comparison, we quote below: These states are Illinois (Sec. 12 and 15, art. 11, Constitution 1870); West Virginia (Constitution 1872); Nebraska (Sec. 4, art. 11, Constitution 1875); Washington (Sec. 18, art. 12, Constitution 1899); Alabama (Sec. 243, Laws 1901); and Georgia (Sec. 2, art. 4, Constitution 1877). Our own provision upon this matter was taken from the Constitution of Illinois of 1870 (*McGrew v. Railroad*, 230 Mo. l. c. 518; *Debates of Cons. Con. of 1875*, p. 141), and it reads thus:

“Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared public highways, and railroad companies common carriers. The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and pas-

senger tariffs on the different railroads in this State, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads, and enforce all such laws by adequate penalties." [Sec. 14, art. 12, Constitution 1875.]

The provisions of the Illinois Constitution, from which, as said above, our own organic law on this subject was taken, ran thus:

"Railways heretofore constructed, or that may hereafter be constructed in this State, are hereby declared to be public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law. And the General Assembly shall, from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this State.

"The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises." [Secs. 12 and 15, art. 11, Constitution of Illinois 1870.]

These express provisions, notwithstanding, it was held in the case of *Chicago, Burlington & Quincy R. R. Co. v. Jones*, 149 Ill. l. c. 376, upon the very point here confronting us that:

"It is claimed that the provision contained in said section 8 which authorizes the commissioners to fix for each of the railroads in the State a schedule of reasonable maximum rates is unconstitutional as being an attempted delegation of legislative power. The constitutional provisions on this subject are as follows: 'And the General Assembly shall, from time to time, pass laws establishing reasonable maximum

rates of charges for the transportation of passengers and freight on the different railroads in this State.' [Constitution, art. 11, sec. 12, 1 Starr & Cur. Stat., p. 163.] 'The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and enforce such laws by adequate penalties to the extent, if necessary for that purpose, of forfeiture of their property and franchises.' [Constitution, art. 11, sec. 15, 1 Starr & Cur. Stat., p. 164.] The power to regulate and control the charges of railroad companies, or other agencies engaged in public employments, is legislative, and not judicial. Independently of such constitutional provisions as are above quoted, it is now the settled doctrine in this country that the legislatures of the states have the power to regulate and settle the freight and passenger charges of railroad companies, and the charges for services of other employments which are public in their character, subject only to such restraints as are imposed by charter contracts, and by the authority of Congress to regulate foreign and interstate commerce. [Munn v. Illinois, 94 U. S. 113; Chicago, B. & Q. R. R. Co. v. Iowa, 94 U. S. 155; Budd v. New York, 143 U. S. 517.] This doctrine is not here controverted. It is admitted that if, in the Act of 1873, the Legislature had prescribed, in definite and specific figures, reasonable maximum rates of charges, the law would have been valid. By an Act approved April 15, 1871, the Legislature of Illinois classified the railroads in the State into four classes, and provided that those in the first class should be limited to two and one-half cents per mile, those in the second to three cents per mile, those in the third to four cents per mile, and those in the fourth class to five and one-half cents per mile, as compensation for the transportation of any person with a certain amount of ordinary baggage. [Illinois Laws 1871, p. 640.] We held this law

to be valid. [Ruggles v. People, 91 Ill. 256.] The Supreme Court of the United States affirmed the decision. [Ruggles v. Illinois, 108 U. S. 526.]

“The objection made to the Act of 1873 is that it is not such an act as was the act of 1871, which was repealed on March 31, 1874. [2 Starr & Cur. Stat., p. 2368.] The Act of 1873 is said to be invalid because, instead of establishing reasonable maximum rates or charges, it is supposed to delegate the power to establish such rates to the railroad and warehouse commissioners. It has been held in a number of cases that statutes which create boards of commissioners, and authorize them to make schedules of rates for railroad companies, are not invalid for the reason here urged. The doctrine of these cases is that the functions of such boards are administrative, rather than legislative; that the authority conferred upon them relates merely to the execution of the law; that a grant of legislative power to do a certain thing carries with it the power to use all proper and necessary means to accomplish the end; and that, as the reasonableness of rates changes with circumstances, and legislatures cannot be continuously in session, the requirement that the statute itself shall fix the charges might preclude the Legislature from the use of the agencies necessary to perform the duty imposed upon it by the Constitution; in short that the Legislature may authorize others to do things which it might properly, but cannot conveniently or advantageously, do itself. [State v. Chicago, M. & St. Paul Ry. Co., 38 Minn. 281; Georgia R. R. Co. v. Smith, 70 Ga. 694; Tilley v. Savannah, F. & W. R. R. Co., 5 Fed. 641; Chicago & N. W. R. Co. v. Dey, 35 Fed. 866; State v. Fremont, E. & M. Valley R. R. Co., 22 Neb. 313, 23 Neb. 117; People v. Harper, 91 Ill. 357; 8 Am. and Eng. Ency. Law, page 911.] . . . We are therefore of the opinion that the act is not unconstitutional for the second reason urged upon our attention by counsel.”

The constitutional provision of West Virginia upon this point reads thus:

“Railroads heretofore constructed or that may hereafter be constructed in this State, are hereby declared public highways and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as shall be prescribed by law; and the Legislature shall, from time to time, pass laws, applicable to all railroad corporations in the State, establishing reasonable maximum rates of charges for the transportation of passengers and freights, and providing for the correction of abuses, the prevention of unjust discriminations between through and local or way freight and passenger tariffs and for the protection of the just rights of the public, and shall enforce such laws by adequate penalties.” [Sec. 9, art. 11, Constitution 1872.]

Construing the above provision upon a similar sort of attack as is now before us, the Supreme Court of Appeals of West Virginia in the case of *State ex rel. v. Baltimore & Ohio Ry. Co.*, 85 S. E. 1. c. 716, said:

“This section is the same as originally adopted in the Constitution of 1872. By acts of the Legislature 1872-3, chapter 227, now contained in chapter 54, sec. 71a1, Code 1913, serial sections 2996, etc., the Legislature, in the exercise of this constitutional power, classified all railroads and undertook to establish reasonable maximum rates and charges for the transportation of passengers and freights, and to limit railroads thereby. The law as thus enacted remained undisturbed until the passage of chapter 41, Acts of 1907, limiting all railroads to two cents per mile, or fractional part of a mile, except railroads under fifty miles in length, and imposing penalties for violations of the statute, and repealing all acts or parts of acts inconsistent therewith. Thus the maximum rate of two cents per mile, instead of the rates fixed by Acts of 1872-3, was established.

"That the Legislature by these statutes undertook to comply with the mandate of the Constitution is manifest, and nowhere has it undertaken to delegate to any board or public service commission its legislative authority under the Constitution to establish reasonable maximum rates, or to promulgate and establish tariffs and rates for passengers or freights, to have general application to all railroads. Chapter 9 of the Acts of the Legislature of 1913 (Code 1913, c. 150, secs. 1-21 [Secs. 636-656]), establishing the Public Service Commission and prescribing its powers and duties, unless in the particulars pointed out by counsel for respondent, neither abrogates nor delegates legislative authority imposed by the Constitution, and is but the reasonable exercise by the Legislature, under said section of the Constitution, of its authority to regulate tariffs and rates and to provide 'for the correction of abuses, the prevention of unjust discriminations between through and local or way freight and passengers tariffs, and for the protection of the just rights of the public,' etc.

"Section 5, of that act, relied on by relator as warranting the relief sought, is as follows:

" 'The commission is hereby given the power to investigate all methods and practices of public service corporations, and to require them to conform to the laws of the State. The commission may compel obedience to its lawful orders by proceedings of mandamus or injunction or other proper proceedings in the name of the State in any circuit court having jurisdiction of the parties or of the subject-matter, or the Supreme Court of Appeals direct, and such proceedings shall have priority over all pending cases. The commission may change any intrastate rate, charge or toll which is unjust or unreasonable, and may prescribe such rate, charge or toll as would be just and reasonable, and change or prohibit any practice, device or method of service in order to prevent undue discrimination or favoritism as between

persons, localities or classes of freight; provided, that the commisison shall not reduce any rate, toll or charge within ten years after the completion of the railroad or plant to be used in the public service below a point which would prevent such public service corporation, person, persons or firm from making a net earning of eight per cent per annum on the cost of the construction and equipment of said railroad or plant. But in no case shall the rate, toll or charge be more than the service is reasonably worth, considering the cost thereof.

“Every order entered by the commission shall continue in force until the expiration of the time, if any, named by the commission in such order, or until revoked or modified by the commission, unless the same be suspended, modified or revoked by order or decree of a court of competent jurisdiction.”

“We fail to find in this section any delegation of legislative power, specifically imposed by the Constitution on the Legislature. Powers conferred by this act upon our Public Service Commission are similar in character to those conferred by Congress from time to time upon the Interstate Commerce Commission, and by many of the states upon commissions of like character, for the control and regulation of public service corporations.”

Likewise it has been similarly held in the State of Washington, the Constitution of which is in the behalf here under discussion similar to ours. [State ex rel. Great Northern Ry. Co. v. Railroad Com., 52 Wash. 33; State ex rel. v. Superior Court of King County, 67 Wash. 37.] To show the only differences existing, we append the apposite provision of the Washington Constitution which thus reads:

“The Legislature shall pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight and to correct abuses and to prevent discrimination and extortion in the rates of freight and passenger tariffs on the dif-

ferent railroads and other common carriers in the State, and shall enforce such laws by adequate penalties. A railroad and transportation commission may be established and its powers and duties fully defined by law." [Sec. 18, art. 12, Constitution 1889.]

Considering whether the above quoted section of their constitution prohibited the Legislature from passing a valid law fixing a joint rate on wheat over the railroad of relator therein and another road, the Supreme Court of the State of Washington, in the case of *State ex rel. v. Railroad Commission*, 52 Wash. l. c. 37, said:

"This whole question was discussed at length in *Chicago, B. & Q. R. R. Co. v. Jones*, 149 Ill. 361, 41 Am. St. 278, 24 L. R. A. 141. There the court decided, under a constitutional provision similar to ours, that a railroad and transportation commission could be established and its powers and duties defined by law. The reason given in many of the cases for the legislative establishment of a commission of this character is that rates established by a commission are more flexible than those established by the Legislature; that railroad rate conditions change rapidly and radically; and that rates established by one session of the Legislature, long before another session convened, might be oppressive, either to the carriers or to the shippers; and that, as long as the rates established by the commission were reasonable rates, which question might finally be determined judicially, there was no invasion of constitutional rights. From a reading of the Commission Act of 1907, it plainly appears to us that it was the intention of the Legislature that the act empowering the Commission to regulate rates worked a repeal of the rates established, or that the repeal would become effective upon the action of the Commission establishing rates which were in conflict with the rates theretofore established by the Legislature."

The applicable provisions of the Constitutions of Georgia and Alabama are in substance and meaning rescripts of each other, the Alabama provision upon the subject having been adopted manifestly from the Constitution of Georgia. In substance, lacking the word "maximum" only, they differ in no material way from our own constitutional provision. The text of the Georgia pronouncement is as follows:

"The power and authority of regulating railroad freights and passenger tariffs, preventing unjust discriminations, and requiring reasonable and just rates of freight and passenger tariffs is hereby conferred upon the General Assembly, whose duty it shall be to pass laws from time to time to regulate freight and passenger tariffs, to prohibit unjust discriminations on the various railroads of this State, and to prohibit said roads from charging other than just and reasonable rates and enforce same by adequate penalties." [Par. 1, sec. 2, art. 4, Georgia Constitution 1877.]

It has been held, however, that this provision of the Constitution of the above states does not prohibit the delegation by the Legislature of power to investigate and fix reasonable maximum rates to a railroad commission. [Railroad Comm. v. Central of Georgia Ry. Co., 170 Fed. l. c. 237; Georgia Railroad v. Smith et al., Railroad Commrs., 70 Ga. l. c. 698; Tilley v. Savannah Ry. Co., 5 Fed. 641.] In each of the above cases the contention made was substantially that the provision of the respective constitutions of Georgia and Alabama imposed upon the Legislature itself the duty of establishing freight and passenger rates by express acts and that any delegation of this duty to a railroad commission was unconstitutional. Appositely, in passing upon the point, the Supreme Court of Georgia said in the case of Georgia Railroad v. Smith, *supra*, this:

"The act of October 14, 1879, provides that fair and reasonable rates only shall be charged by the railroads of the State. Did the constitutional con-

vention, by paragraph 1, section 2, article 4, intend more than the passage of a general law, such as this, to carry into effect the clause here referred to? It certainly was not contemplated that the details of rates to be fixed over the many miles of railway in the State, should be settled and determined by the Legislature. The many influences that combine to cause changes in the ever-varying vicissitudes of trade and travel were neither overlooked nor forgotten by that body. The utter impossibility of preparing by the Legislature just and proper schedules for the various railroads, with their differences of length, locality and business, appears to us to be so clear and manifest as that to have entertained it would have been absolutely absurd. And especially so, when it is remembered that schedules just and right, where arranged for the months of winter, might be ruinously unjust and wrong for the months of summer; or that such as were proper for the year of the meeting of the General Assembly might the succeeding year well nigh bankrupt every railroad corporation in the State. In our judgment, the act creating the Railroad Commission is not unconstitutional and void."

In the Alabama case, *supra* (Railroad Comm. v. Central of Georgia Ry. Co., 170 Fed. l. c. 238), it was said:

"The contention of the complainants is that, the Legislature having prescribed rates, or maximum rates, it could not by previous or subsequent statutes authorize the Railroad Commission to change them. It is not denied that the Legislature could confer on the commission the power to fix the rates, or that the Legislature could, if it chose, when practicable, fix them itself. The contention is that, when once fixed by Legislative enactment, power cannot be conferred on the Commission to change or repeal the law. . . . The Commission, from the time of its creation, had the power to reduce rates, and, when the Legislature fixed maximum or other rates, it knew of this power

of the Commission, and did not repeal it. We think the Legislature had the power to confer the authority in question on the Commission. [Saratoga Springs v. Saratoga Gas Co., 191 N. Y. 123, 83 N. E. 693.] Whether established directly by legislative action or by the Commission, the rates are always subject to the limitations of both the State and Federal constitutions. To hold that the Legislature could not confer on the Commission the power in question would either deprive the Legislature of the right to make rates by direct act, or deprive the Commission of the power to regulate them. This would not be sound, for, as a question of power, they may be regulated by either the Legislature or the Commission. . . . We do not think the statutes in question are void as conferring on the Commission legislative power in violation of the Alabama Constitution."

After a diligent search we have not been able to find any case from any state having a constitutional provision similar to our own, which conflicts with those above cited, and quoted from, nor has the diligence of counsel furnished us any such from any of the states falling into this category. We have already seen that the rule is well-nigh universal that the fixing of rates may be delegated in all those states which have no such express constitutional provision, and which derive their legislative power to establish reasonable maximum rates from the general sovereign power to legislate on every subject of public welfare which is not specifically forbidden by their Constitutions. [Saratoga Springs v. Saratoga Gas Co., 18 L. R. A. (N. S.) 713, and cases cited, *supra*.]

Upon this point then both classes of cases, that is, (a) those arising in jurisdictions having express provisions like ours, and (b) those arising in jurisdictions having no such provisions, agree, that by reason of the inherent peculiarities and difficulties in the way of the sensible and reasonable administration by any other method, it is not forbidden delegation

of legislative power to clothe a public service commission with the power of establishing reasonable rates, maximum or minimum. However, it is self-evident that, since as we have plainly seen the Legislature of this State had and exercised the power to establish reasonable maximum rates of carriage for freight and passengers, long before section 14 of article 12 was ever written into our Constitution, the latter section of the Constitution was merely expressive of a theretofore existing constitutional power. Therefore, it follows that the above section adds nothing of either authority or inhibition (*State ex rel. v. Railroad Comm.*, 52 Wash. l. c. 37), and so the cases which come from states having no express provision as to the legislative authority over railroads, and which hold constitutional the delegation of this power, are just as cogent, binding and persuasive as cases from Illinois, West Virginia, Alabama, Washington and Georgia, which have constitutional provisions similar to our own, and which we cite specifically upon this point. We are constrained to conclude, therefore, that the courts of this Nation, seeing the absolute impracticability of any other sort of just supervision over rate-making, have with a unanimity that is remarkable agreed that the delegation of power is not forbidden by the organic law. On this point a learned writer has said:

“Nothing is more significant in the history of American institutions of late years than the spread of this movement. The concentration of the regulation of all the utilities which are public in character has become a policy to which all parties have given their support. During the past few years there has not been a time when the establishment of a public service commission, with general jurisdictions over all the utilities, has not been written in the annals of the legislation of several states. . . . The whole movement toward commission regulation rests upon the public conviction that the earlier methods of regula-

tion attempted through court processes has proved upon the whole ineffective, and that specific legislation has been in most instances unintelligent. As a practical matter the justification of the commission activity and supervision, as against statutory control enforced by the courts, is that there is thereby established a specialized body, expert in the particular work which it has to perform. The modern statutes establishing these bodies recognize the commission as the organ of the State both for protecting the rights of the utilities in the performance of their functions and for compelling the utilities to render in proper manner all of their public duties. Chief among the powers essential to such a commission is the right to obtain full information upon every point affecting the operatives of the companies subject to its jurisdiction. The power is generally given to the commissions in the states to determine and establish after notice and hearing just and reasonable rates and the classifications and regulations appertaining thereto." [Beale & Wyman on Railroad Rate Legislation (2 Ed.), secs. 64-66.]

Learned counsel for respondent urgently contends that the Legislature cannot delegate any power solemnly committed to it by the organic law. Upon this point the commendable industry of counsel has collated for us many authorities. These cases but announce the general and recognized rule that no one of the three co-ordinate branches of government may encroach upon the domain of another such branch, even with permission or by express invitation; in short, that the constitutional powers respectively committed to these branches are not delegable. The reason lies, it is probable, in the maxim that a power held by delegation may not be delegated. The sovereign people committed these powers to one co-ordinate branch; this branch cannot sell them, evade them, pass them on, or give them away to another. With these cases, therefore,

we have no quarrel; they are however, in our view beside the point confronting us.

In ultimate effect the Legislature enacted that railroad rates should be reasonable, having due regard to the reciprocal rights of the public and the carrier, and empowered the Commission, upon a hearing, to ascertain what rates are prima-facie reasonable. This we think, the authorities conclusively hold it had the power to do. [State v. Atlantic Coast Line Ry. Co., 56 Fla. 617; Chicago, B. & Q. R. R. Co. v. Jones, 149 Ill. 361; Michigan Central R. R. Co. v. Michigan Railroad Com., 160 Mich. 355; Oregon R. R. & Nav. Co. v. Campbell, 173 Fed. 957; Chicago & N. W. R. Co. v. Dey, 35 Fed. 866; Morgan's Co. v. Railroad Com., 109 La. 247; State v. Great Northern Ry. Co., 100 Minn. 1. c. 477; State ex rel. v. Chicago, M. & St. P. Railroad, 38 Minn. 281.]

We concede that if the Legislature had by a statute said in effect to the Commission, "Fix reasonable maximum rates for freight and passengers upon the railroads of this State, and your action in this behalf, shall be, till either you or we revoke or repeal it by order or act, as conclusive as our own action would be if we were ourselves to fix such rates by statute," it is highly probable that this would constitute a forbidden delegation of power. But that is not what the Legislature did in passing said section 47. What it actually did was to authorize the Public Service Commission "*after a hearing had,*" and upon ascertaining "*that the maximum rates, fares or charges chargeable*" (i. e., capable of being charged) "*by any such common carrier . . . are insufficient,*" to "*determine*" (i. e., ascertain and render certain by the hearing had), "*with due regard, among other things to a reasonable average return upon the value of the property actually used in the public service,*" etc., "*the just and reasonable rates, fares and charges to be thereafter observed and in force as the maximum*

to be charged for the service to be performed." [Sec. 47, Public Service Commission Act.] (Italics ours.)

From the very terms of this statute it will be observed that the Legislature has not delegated to the Commission the absolute power of fixing maximum rates, but alone the power to ascertain and determine what rates are reasonable (*Field v. Clark*, 143 U. S. 649), and by self-contained provisions in the act provided for a judicial review of the fact of reasonableness, which is only *prima-facie*, and while the commission may order the observance of these rates so found by it to be reasonable, under penalties for violation fixed by the Legislature (Sec. 63, Laws 1913, p. 599), such observance endures subject to a review by the courts. The Legislature itself can fix a rate, without providing means in the act itself for a judicial review of the fact of reasonableness, but it could not delegate so thorough-going a power to the commission. Nor has it done so here. The fact of reasonableness as the commission is authorized to determine it, is seen to be only *prima-facie*, for the courts may review the facts whereon the commission's conclusion of reasonableness is bottomed. [Secs. 110 and 111, pp. 640 and 641, Laws 1913.] In the sections last above it is provided that "any corporation or person or public utility interested" may apply for a rehearing "in respect to any matter determined" by the Commission (Sec. 110, *supra*), and if such rehearing be denied the applicant (for a rehearing) may obtain from the circuit court "a writ of *certiorari* or review for the purpose of having the reasonableness or lawfulness of the original order or decision . . . inquired into or determined." [Sec. 111, Laws 1913, p. 641.] Examining the actual limits of the power conferred and drawing these distinctions which we think are deducible from the act itself and fully warranted by the cases (*C., B. & Q. R. R. Co. v. Jones*, 149 Ill. 361; *Chicago, M. & St. P. R. R. Co. v. Minnesota*, 134 U. S. 1. c. 462; *Stone v. Farmers' Loan*

& Trust Co., 116 U. S. 407; Chicago & N. W. R. Co. v. Dey, 35 Fed. 866; Budd v. New York, 143 U. S. 517; State ex rel. v. Chicago, M. & St. P. Ry. Co., 38 Minn. 281; Field v. Clark, *supra*; United States v. Grimaud, 220 U. S. l. c. 520), we do not regard the authorities urged upon us by respondent as either applicable or controlling.

We conclude therefore that section 47 of the Public Service Commission Act is not for the reasons and authorities we have deemed it illuminating to set forth at so much length, so opposed to section 14 of article 12 of our Constitution as to be invalid, and that till the Legislature shall see fit to change the law by other enactments upon the subject-matter, the Public Service Commission may ascertain and establish reasonable maximum rates of carriage for intra-state freight and passengers upon the railroads of the State.

It follows that the case must be reversed and remanded to the circuit court with directions to affirm the order made herein by the Public Service Commission. Let this be done.

All concur except *Bond, J.*, who dissents as to paragraph 5 and result, and *Williams, J.*, who does not sit.

BOND, J. (dissenting).—Under the construction given section 47 of the Public Service Commission Act (Laws 1913, p. 583; *Mo. Southern Ry. Co. v. Pub. Serv. Com.*, 259 Mo. l. c. 728), I see no escape from

**Empowering
Commission
to Substitute
Its Own Rates
for Maximum
Rates Established
by Statute.**

the conclusion that said section was an attempted transfer by the Legislature of a specific duty expressly imposed upon it by the Constitution of the State. The pertinent portion of the Constitution of this State designating the Legislature as the organ of government to which is entrusted the power

and duty of fixing a rate which may not be exceeded

by railroads in charges made by them for passenger and freight service is, to-wit:

"The General Assembly . . . SHALL *from time to time pass laws* ESTABLISHING *reasonable maximum rates of charges* for the transportation of passengers and freight on said *railroads*, and enforce all such laws by adequate penalties." [Sec. 14, art. 12, Constitution 1875.]

This excerpt from our Constitution was taken bodily from a similar provision in the Constitution of Illinois. This provision was held in judgment by the Supreme Court of the sister state from which it was taken in the learned and accurate opinion by MAGRUDER, J. (C. B. & Q. Ry. Co. v. Jones, 149 Ill. l. c. 381), wherein, after a full review of the case law, it was announced, to-wit:

"Under the constitutional provisions above quoted the Legislature of this State has the right, and it is ITS *prerogative*, if it chooses to exercise it, to pass a law ESTABLISHING OR FIXING reasonable maximum rates of charges. When it passed the Act of 1873 [referring to one creating a board of railroad and warehouse commissioners] it did *not* choose to exercise the power thus conferred upon it. That act does *not establish* reasonable maximum rates, nor does it delegate to the board of railroad and warehouse commissioners the power to establish SUCH rates. When a board is authorized to make a schedule of rates, and their schedule is merely given the force and effect of *prima-facie* evidence as to the reasonableness of the rates in a suit involving the question of such reasonableness, there is no delegation to the board of the legislative power to establish rates. The Legislature thereby merely REFRAINS from the exercise of its constitutional power, and, by leaving the question as to the reasonableness of the rates open, makes room for the exercise by the courts of their jurisdiction upon the subject. . . . But if it be conceded that making the schedule of the commission final and conclusive as to the rates is a dele-

gation of legislative power, it is sufficient to say in the present case that the Act of 1873 does not give to the schedule any such final and conclusive effect. We are, therefore, of opinion that the act is not unconstitutional for the second reason urged upon our attention by counsel." [I. e. delegation of power.] (*Italics ours.*)

The above quotation shows not only the radical difference between the case before the Illinois court and the one at bar, but also the true principle applicable to each. In the present case the State of Missouri did exercise its "prerogative" to fix maximum freight and passenger rates. In the Illinois case the Legislature did *not*, at any time, exert its constitutional power and prerogative to establish and fix a reasonable *maximum rate* of charges. It wholly refused to do so, nor did it attempt to devolve that specific duty upon the Railroad and Warehouse Commission. It only gave that body the right to fix reasonable charges *which should be prima-facie evidence in suits against carriers*, and wholly subject to judicial review in such actions. Necessarily the creation of a board with such limited powers did not operate as a delegation to it of the particular power expressly devolved upon the Legislature of Illinois by the Constitution of that State, to-wit: "To establish and fix reasonable maximum rates of charges." The Legislature of Illinois never parted with its exclusive power in that respect, and from the above summation of its views, it is evident that the learned Supreme Court of that State connoted this fact and made it the basis of its decision upholding the provisional and limited authority of the Board of Railroad and Warehouse Commissioners to make a schedule of charges which should have no force or effect even in suits against carriers, except as affording *prima-facie evidence* of a reasonable charge. All, therefore, that was decided in the Illinois case was, to use its language further: "We do not, however, understand the Federal cases to hold that an act of a state legislature may not be valid, if *while omitting to re-*

SELF *fix the maximum rates*, it creates a commission with authority to make schedules which shall be prima-facie evidence of the reasonableness of the rates." This enunciation of the law is incontrovertibly correct and shows by necessary implication that the validity of the appointment of such boards is made expressly to depend upon non-action by the State itself in the matter of exercising the power exclusively vested in it by its own constitution.

Applying this rule I hold that since the General Assembly of the State of Missouri *did* exercise its exclusive power to establish and fix maximum rates, it could not thereafter exercise it again except through the medium of its own power as a legislative body.

II. It cannot be necessary to do more than call attention to the language of the Constitution *supra* to prove that the power "to establish . . . maximum rates" is exclusively lodged in the General Assembly and that being expressly lodged in that department of the government, it is secure from invasion by all others. When the Constitution designates a particular donee of a power, only that functionary can exercise it and all others are necessarily excluded by the specification of one. These canons of constitutional construction are attested in all the decisions. Had our Constitution failed to point out and name the General Assembly as the particular governmental agency commanded "to establish . . . maximum rates" then the Legislature might have devolved that duty on some other than itself. For it is a truism that the Legislature may enact any law not expressly or impliedly prohibited by the State or Federal Constitution. But it can enact *none* which contravenes any provision of the State or Federal Constitution, both of which limit its powers to legislate. In the matter in hand our State Constitution says "the General Assembly shall . . . *establish* . . . maximum rates." There is no process of interpretation by which these words can be made to lose either

Delegating
Imposed
Duty.

the imperative force or specific designation intrinsic in their meaning. Hence, they limit the power to carry out the *command* to the body on which it is laid. In the face of these clear and controlling principles of constitutional construction can there be any reason why we should follow the rulings in the states of Arkansas, West Virginia, Alabama, Georgia, or Washington, founded on local constitutions not identical with the Constitution of this State, rather than the convincing decisions of the State of Illinois, whose constitution is identical, on this point, with ours?

The rulings of other states are not controlling with us, nor even persuasive when it is seen that either they do not touch the point under review, or else are lacking in logical exposition of fundamental principles. None of those cited bear on the single issue in this case; which is, whether a constitution which invests in *one body* the power and duty to do a specific act, is not violated when the delegated body attempts to substitute another agency for the performance of the act which the constitution provides shall only be performed by the body specified in its terms. The Constitution of Missouri having in clear terms selected and appointed one agent for this particular task, the Legislature is powerless to disregard that constitutional provision by substituting another. *This is the whole question presented in this case.* Hence it is quite off the point to refer to the familiar rule that unless restricted by the Constitution the General Assembly has plenary power to legislate, in the pursuance of which it may commit it to inferior bodies—such as public service commissions—the finding of reasonable rates to be charged by carriers, subject to review by the courts. That is a well recognized rule, but can have no application, in a case like the present, where the Constitution has declared that the making of top or maximum rates “*SHALL*” be done by the Legislature itself.

III. The maximum rates established by the laws passed by the General Assembly under the mandate of

the Constitution, have been sustained by the Supreme Court of the United States. [Missouri Rate

Higher Rates.

Cases, 230 U. S. 474.] The later acts of the Legislature devolving its constitutional duty on the Public Service Commission being in violation of the organic law, as far as it undertook to give the Commission a right by its order to create *higher* rates of charge than those established by the legislature itself, the question arises what is the remedy which the carriers are entitled to invoke? Necessarily only through a new or amended constitution. For the impediment to relief through the fixing of "maximum rates" by an administrative board is the restriction contained in our Constitution of 1875. That instrument has been unchang-

New

Constitution.

ed for nearly fifty years has become an anachronism as applied to the changed conditions wrought by the lapse of half a century of business development, and should be succeeded by a new constitution, adapted to the present demands of the vast and varied industries of the State and the needs of its people, and which should annul the restrictions in this respect imposed on the General Assembly by the language of the present Constitution.

Being unable to find any constitutional warrant for the theory that the order of the Public Service Commission could, in any event, conditionally or otherwise, repeal the existing State statutes now regulating charges of carriers, I am constrained to dissent from the discussion and conclusion of the learned majority opinion.

THE STATE ex rel. AMERICAN MANUFACTURING COMPANY v. GEORGE D. REYNOLDS et al., Judges of St. Louis Court of Appeals.

In Banc, April 28, 1917.

1. **DURESS: Payment of Taxes.** If the law prohibited the corporation from continuing its business unless it possessed a manufacturer's license, and made each day's continuance of its business without such license a separate offense punishable by heavy fine, and forbade the collector to issue a license until the illegal taxes were paid, and required the collector to prosecute the corporation for continuing its business without such license, a payment of the taxes, under protest, to avoid prosecution and to obtain a right to continue its business, was a payment under duress.
2. ———: ———: **Property Right.** A corporation's potential existence depends on its ability to transact the business for which it was incorporated, and this is a property right; and if a failure to pay illegal taxes will, because of the penalties and inhibitions which the laws impose, prevent a continuance of that business, a payment, to avoid prosecution and to acquire the right to continue the corporate business without molestation, will constitute payment under duress.
3. ———: ———: **Threats: The Law Itself.** If the law under which the license collector was demanding the tax and proceeding to enforce its collection provided that it should "be his duty to prevent any person carrying on any business, object or calling for which such license or license tax is required, without having a license or license receipt for that purpose" and that he should "report to the police court of such city all violations of law or ordinances relating to license and license taxes" and further provided that no manufacturer should continue his business without such license and if he did so he should be liable to a fine of \$500 for each day's continuance, the law itself, coupled with the collector's demand that the manufacturer pay the tax as a final and absolute condition to the issuance of the license, constituted a threat to put the manufacturer out of business unless he paid the tax.
4. ———: ———: **Remedy: Dictated by Defendant.** It does not lie in the month of the defendant who has through duress extorted an illegal tax from a manufacturer as the price of his continuing in business, to contend, when the manufacturer sues to recover the amount of the tax thus paid under protest, that his remedy was by writ of mandamus to compel the granting of license upon tender of the tax; for, one who uses his extraordinary powers for pur-

poses of extortion is not privileged to dictate the particular remedy which his victim shall choose from among those which the law affords.

5. ———: ———: ———: **Common Law a Mantle of Justice.** Remedial justice extends itself like a mantle over those things that come within the reason of the law; and when legislative ingenuity devises new plans for the enforcement of its enactments, the common law automatically extends corresponding protection to those who obey them.
6. ———: ———: ———: **State as Extortioner.** If the State proceeds by methods of its own making calculated to compel the taxpayer to yield, whether right or wrong, to avoid an overpowering injury, it has no right to complain if, having the bone of contention in its own possession, it must try the right to it on equal terms.
7. **CERTIORARI: Opinion of Court of Appeals: Judgment Right Despite Conflict.** Although the opinion of the Court of Appeals conflicts with prior rulings of the Supreme Court in certain particulars, it will not be quashed upon *certiorari* if upon good reasons in law the judgment directed by it was right. Notwithstanding the opinion of the Court of Appeals conflicted with the prior rulings of the Supreme Court in holding that the payment of the illegal tax was not made under duress, yet if it correctly decides that, whether or not duress was exercised, the tax cannot be recovered from the collector, its judgment based upon that decision will be upheld.
8. **PAYMENT OF ILLEGAL TAXES: Recovery From Collector.** A suit against the city collector, who is the agent of the State in collecting State taxes, to recover back the amount of a State tax illegally demanded and paid to him under duress, cannot be maintained, if he has already transmitted it to the State Treasury. The Legislature alone can give relief in such circumstances. The rule is that where money illegally collected by color of law still remains in the hands of the collector it may be recovered from him by the party paying it; but if it has been paid over by the collector to the proper authorities, he is no longer responsible for it, though it appears he acted under an authority which was void.

Certiorari.

MOTION QUASHED (in part).

Barclay & Wallace for relator.

(1) The judgments of the St. Louis Court of Appeals are beyond and in excess of the jurisdiction of that court and should be quashed, because therein that court did not follow or apply the last previous ruling

and controlling decision of the Supreme Court rendered on the identical facts, in relation to the same relator and its business. *Am. Mfg. Co. v. City*, 238 Mo. 267. (2) The judgments under review on this writ should be quashed because they are in conflict with the last controlling decisions and rulings of the Supreme Court as to what payments are voluntary when made under protest, "in order to avoid prosecution and continue its business" to officers empowered to enforce penal tax laws. *R. S. 1909*, secs. 11461, 11617-18, 11646-8; *Am. Mfg. Co. v. City*, 238 Mo. 267; *Westlake v. City*, 77 Mo. 47; *Bank v. Bank*, 244 Mo. 554; *Construction Co. v. Hayes*, 191 Mo. 301; *Loring v. City*, 80 Mo. 468; *Am. Brew. Co. v. St. Louis*, 187 Mo. 367; *Am. Brew. Co. v. City*, 209 Mo. 600. (3) The said judgments of the St. Louis Court of Appeals should be quashed because in conflict with decisions of the Courts of Appeals on the decisive point on which the learned opinion herein by the St. Louis court has been placed. *Voelpel v. Ins. Co.*, 183 S. W. 681; *Niedermeyer v. University*, 61 Mo. App. 654; *Brown v. Worthington*, 162 Mo. App. 508; *Link v. Real Est. Co.*, 182 Mo. App. 531. (4) The judgments herein reviewed as rendered by the Court of Appeals not only misapplied the above-stated law as laid down by this court, but did not apply another settled principle heretofore declared by the Supreme Court and which, properly applied, would have led to a reversal of the judgment in question, notwithstanding *Claffin v. McDonough*, 33 Mo. 412, on which the Court of Appeals undertook to found its decision. That principle is that moneys illegally obtained by a public officer as a condition to granting a license without which the business of the victim cannot be continued, as in circumstances here disclosed, may, in all cases, be recovered back—being extortion and beyond the power of such officer. *Loring v. City*, 80 Mo. 468; *Maguire v. State Savings Assn.*, 62 Mo. 344; *Brewing Co. v. St. Louis*, 187 Mo. 367; *Wood v. Telephone Co.*, 223 Mo. 537.

E. C. Slevin for respondents.

(1) The judgment in *Claffin v. McDonough*, 33 Mo. 412, was clearly controlling upon the respondents and it is the last previous ruling of this court upon the law and facts involved in the case decided by them. (2) There is nothing in *Am. Mfg. Co. v. St. Louis*, 238 Mo. 267, to indicate that the Supreme Court has taken a broader view than that announced in *Claffin v. McDonough*, in cases of this character where the suit proceeds against a public officer. (3) While it may be true that unlawful exactions paid under the stress of urgent business necessity, may constitute duress, a mere threat of legal process cannot be so considered, "for the party may plead and make proof and show that he is not liable." *Claffin v. McDonough*, 33 Mo. 412; *Wood v. Telephone Co.*, 223 Mo. 537. (4) If appellant deemed the exactions to be unlawful, ample remedy was afforded to it by a resort to mandamus. *Butler v. Moberly*, 132 Mo. App. 172; *State v. Alt*, 224 Mo. 493.

GRAVES, C. J.—*Certiorari* to the St. Louis Court of Appeals in two cases, wherein the American Manufacturing Company is plaintiff and appellant, and Louis Alt is defendant and respondent. The cases were briefed and argued together in the St. Louis Court of Appeals and disposed of by that court by one principal opinion and a *per curiam* opinion following the principal opinion. In the principal opinion the Court of Appeals thus outlines the case it had before it:

"Plaintiff prosecutes this appeal from a judgment against it on demurrer to its petition. The petition is in three counts. The material averments presenting the question for consideration here are the same in each count and it is, therefore, unnecessary to set forth more than one.

"The first count of the petition is as follows:

"1. The American Manufacturing Company, plaintiff, states that it was at all times hereafter stated

a corporation duly organized and incorporated under the laws of the State of West Virginia and licensed to do business in the State of Missouri and had at said times in the city of St. Louis an office and factories for the manufacture of bagging and was doing business in the city of St. Louis as a manufacturer; and that defendant, Louis Alt, is and was at said times the License Collector of and for the city of St. Louis, Missouri.

“ ‘2. Plaintiff further states that the greatest aggregate amount of raw materials of plaintiff on hand in the city of St. Louis at any one time between the first Monday of March and the first Monday of June of the year 1908 included jute butts, in the original packages, of the value of \$75,855, imported by plaintiff, from foreign countries, for the purpose of being manufactured by it into bagging, and then awaiting manufacture.

“ ‘3. Plaintiff further states that said defendant demanded that plaintiff should pay (in addition to all taxes on all of plaintiff's other raw material, finished products, tools, machinery, and appliances—which plaintiff paid), as a condition to the issuance of its license for the then succeeding year, a sum of money equal to a tax of 17 cents (imposed by the State of Missouri on each \$100 of value of the greatest aggregate amount of raw material of plaintiff on hand in said city at any one time between the first Monday of March and the first Monday of June of the year 1908) on each \$100 of value of said imported material; and said defendant refused to issue to plaintiff a manufacturer's license unless it paid him said sum amounting to \$128.95; and, assuming to act by virtue of the authority vested in said office of License Collector, threatened to have plaintiff prosecuted daily in the courts of this State and daily fined for carrying on in the city of St. Louis without a manufacturer's license the business of a manufacturer; that plaintiff was not authorized to continue its business in said city without a manufacturer's

license from said defendant as said Collector, and each day's continuance in business without such license was a separate offense under the laws of the State of Missouri and ordinances of the city of St. Louis; and said defendant was empowered under said statutes and ordinances to institute prosecutions against plaintiff for each day it continued its business in the city of St. Louis without said manufacturer's license, and it was impossible for plaintiff to continue in business as a manufacturer in said city without said license; and the plaintiff says that because of its liability to and the threat of such prosecutions and the duress thereby created, and the urgent business necessity of the situation, it paid to said defendant, in order to avoid prosecution and continue its business, under protest, said sum of \$128.95, and thereupon received from said defendant a manufacturer's license for the then succeeding year; and plaintiff was compelled to make such payment in order to continue in business as a manufacturer in the city of St. Louis.

“ ‘Plaintiff further states that, under the ordinances of said city of St. Louis, its failure to have acceded to said defendant's demand for the payment of said sum, and secured its license, would have subjected it to the liability of a double assessment of its said property by said Collector for said city's taxes, and also to a fine of five hundred dollars for each day it continued its said business in said city without said license.

“ ‘4. Plaintiff states that at and before the time of the payment of said \$128.95 to said defendant he, the said defendant, was advised by plaintiff that said material upon which plaintiff was so required to pay said sum was imported from a foreign country by said plaintiff and was then remaining in original packages awaiting manufacture by plaintiff; plaintiff further states that at and before said time it also notified said defendant in writing that said property was not a subject for taxation, and that same was claimed by plain-

tiff as wholly exempt therefrom; and that it, the said plaintiff, would institute and prosecute suit for the recovery of said sum so paid thereon.

“5. Plaintiff further states that said defendant had no right or authority to require the payment of any sum on said imported material and that the exaction of said sum of \$128.95 or any part thereof by said defendant under color of his office was a wrongful exaction and said sum was unlawfully collected from plaintiff by said defendant.

“6. Plaintiff further states that it paid to said defendant said sum of \$128.95 illegally exacted as aforesaid on the 19th day of September, 1908, and it prays judgments against said defendant for said sum of \$128.95.’

“The court sustained defendant’s demurrer to each count of the petition in the view that the taxes were voluntarily paid and not under duress.”

In the brief for respondent Alt in the case before the Court of Appeals it is suggested that both parties agreed that there were two grounds averred by that demurrer, *nisi*, thus:

“Appellant therefore properly states the two questions for the consideration of this court:

“First: Were the payments made as disclosed in the two petitions voluntary or under duress?

“Second: If, under duress, is the respondent personally liable for the amounts so paid?”

It is clear that these two questions were in the case. As best we read the Court of Appeals’ opinion, it holds that there was no duress, but that even if there was duress, the officer is not individually liable. Contentions pro and con will be noted in the opinion.

I. It is argued that the Court of Appeals’ opinion conflicts with views expressed by this court in *American Manufacturing Co. v. City of St. Louis*, 238 Mo.

Duress. 267. The conflict, if there be a conflict, lies within a narrow compass. In the 238 Mo., *supra*, we had a case wherein the city was sued for

taxes which it had received, and wherein it was alleged that the payment of them had been made through duress. BROWN, J., in that case assumed as true, without discussing the question of duress. The only mention thereof is in this language:

“Defendant collected the three items of taxes last hereinbefore mentioned, aggregating \$2161.34. Payment thereof being made under duress and to avoid prosecution under defendant’s ordinance, and the defendant having received into its treasury \$1578.26 of said taxes, this action is brought to recover same.”

It is true that the allegations as to duress in that case are substantially as they are in the record now before us. However, in that case the plaintiff was suing the city which actually received and held the taxes, whereas in the case at bar the suit is not against the State, which actually received and has the money, but against the official who collected it and turned it over to the State. At least in some respects the two cases are not parallel. But on the simple question of duress they must be held to be the same. The pleadings are the same in effect, if not in exact language. The Court of Appeals in its opinion relies upon the case of *Claffin v. McDonough*, 33 Mo. 412, and says that we did not broaden the rule there announced in *American Manufacturing Co. v. City of St. Louis*, 238 Mo. 267. Whilst we did not fully discuss the doctrine of duress in 238 Mo., supra, we have had occasion to refer to that case and to fully discuss the question. In the case of *American Manufacturing Co. v. City of St. Louis*, 192 S. W. 399, October Term, 1916, of Division One of this court, BROWN, Commissioner, with a full concurrence of the court, well said:

“It is admitted in the argument that the levy of the tax on this important material was in violation of section eight of article one of the Constitution of the United States vesting Congress with the power to regulate commerce with foreign nations, and therefore

void. The only questions remaining in the case for our consideration are: (1) whether this tax was paid under such circumstances of duress or compulsion as entitles the plaintiff to recover it back from the city, and (2) whether, if plaintiff is entitled to recover it, it should have interest on the amount before judgment.

"The appellant says that under the facts shown, the payment of the illegal tax was voluntarily made and that the respondent is not therefore entitled to recover it back. It says that while the doctrine of duress, which formerly required an actual threat of immediate seizure of person or goods, has been broadened somewhat, it does not yet extend to the facts of this case. In that connection it cites *Claffin v. McDonough*, 33 Mo. 412, an action against the Collector of the City and County Revenue of St. Louis County, to recover money unlawfully exacted and paid as a tax for the purpose of obtaining a merchant's license. The petition alleged 'that plaintiffs, refusing to pay such tax, would have been liable to and were threatened with prosecution by indictment therefor, entailing heavy expense and loss,' and that therefore the plaintiff paid said tax under protest. Upon demurrer, the trial court held that the facts so cited did not show such compulsion as to authorize its recovery on that ground. In sustaining the judgment, this court said (pp. 415-16): 'It is not averred that the defendant had any authority to seize the persons or goods of plaintiffs, or threatened or attempted to do either; but it is averred that they were threatened with an indictment, and they paid the amount to avoid the expense and annoyance of a prosecution. In our opinion, this does not make it a payment under duress. To constitute duress there must be a seizure of the property or arrest of the person, or a threat or attempt to do one or the other, or facts must be stated which tend to show or which warrant the conclusion that such an arrest or seizure could be avoided only by the payment of the tax demanded.' While the facts pleaded in that case fall far short of

constituting such threatened injuries as are shown here, it is contended that because immediate arrest or seizure of property are not among those injuries the necessary duress did not exist.

“It is true that the plaintiff was a corporation and there was no danger that its body would be seized and cast into prison, but its potential existence depended on its ability to transact the business for which it was incorporated. That this constituted property is evidence. That its destruction would work an injury as substantial as the seizure of a bale or two of its manufactured product is also evident. The law under which the license collector was proceeding provided that it should be his duty to prevent any persons carrying on any business, object or calling for which a license or license tax is required, without having a license or license receipt for that purpose,’ and that he should ‘report to the police court of such city all violations of law and ordinances relating to license and license taxes.’ [R. S. 1909, sec. 9840.] This of itself constituted a threat to put the respondent out of business should he refuse to make the payment which the license collector demanded as a final and absolute condition to the issue of the license. For the purpose of enabling him to perform this duty penalties of a criminal nature were imposed providing for prosecutions from day to day while the manufacturer should attempt to prosecute its business without a license. The refusal to issue the license in itself constituted an assertion by the license collector that it would perform the duties enjoined by the statute and ordinances to *prevent* the respondent from continuing his business, and to this was added the specific threat of daily prosecution. In relation to this same question presented in a very similar case the Supreme Court of the United States in *Railway v. O'Connor*, 223 U. S. 280, 286, said: ‘But even if the State is driven to an action, if at the same time the citizen is put at a serious disadvantage in the assertion of his legal, in this case of his consti-

tutional, rights by defense in the suit, justice may require that he should be at liberty to avoid those disadvantages by paying promptly and bringing suit on his side. He is entitled to assert his supposed right on reasonably equal terms.'

"It is said that in this transaction the extraordinary remedy by writ of mandamus was available to compel the granting of the license upon tender of the amount due. So in case of arrest or levy under void process are *habeas corpus* or replevin. But it does not lie in the mouth of one who uses his extraordinary powers for purposes of extortion to dictate the particular remedy which his victim shall choose from among those which the law affords him. Remedial justice extends itself like a mantle over those things that come within the reason of the law, and when legislative ingenuity devises new plans for the enforcement of its enactment, the common law automatically extends corresponding protection to those that obey them. If the State elects to proceed by an action which places it upon an equality before the law with the tax payer, justice may be done to both alike in its prosecution and defense; but if it proceeds by methods of its own making calculated to compel the taxpayer to yield, whether right or wrong, to avoid an overpowering injury, it ought not to complain if, having the bone of contention in its own possession, it must try the right to it on equal terms.

"The city demanded the tax and refused to issue the license without its payment in its capacity as a governmental agent of the State. The refusal of the license amounted to an assertion that it would prevent the respondent from doing business until the unlawful demand should be complied with and for that purpose use all the means provided by its charter and ordinances so far as necessary to accomplish that result. It held in its hands the power of the executive as well as of the judicial department of the State Government for that purpose. The respondent could resist only in the courts, where, in theory at least, he would stand

upon terms of equality before the law . Such equality demanded that he should not be required to place his hand in his adversary's mouth before proceeding with the contest. To avoid this he adopted a method which recommends itself for its fairness. He placed the money in the hands of the city that the interest of the public might not be imperiled while he tested his right. This is the method of which Judge Cooley in his splendid treatise on Taxation (3 Ed., p. 1506) says: 'Any payment is to be regarded as involuntary which is made under a claim involving the use of force as an alternative; as the party of whom it is demanded cannot be compelled or expected to await actual force; cannot be held to expect that an officer will resist after making a demand . . . It is sufficient if the circumstances are such that the waste and expense can be avoided only by payment,' and the author cites a large number of cases fully sustaining his position, to which those curious for further information can easily refer.'

Our learned Commissioner has so well expressed what we had in mind in the case reported in 238 Mo., supra, that we use his language in preference to our own. It but illustrates the assumption of duress in our case reported in 238 Mo. l. c. 273. It discusses the 33rd Mo., relied upon by our brothers of the Court of Appeals. In so far as that court announces in its opinion that the facts pleaded failed to show duress it conflicts with the views of this court. Whether its judgment is wrong and should be quashed is another question. This because there is another live issue left in the case, which matter we take up next.

II. In view of the later discussions by this court. we have no doubt that the facts in this case (the case decided by the Court of Appeals) constituted such duress as would render the payment of the tax involuntary and under duress. Besides the case quoted from, supra, we have reached a like conclusion in *Simmons Hardware Co. v. City of St. Louis*, 192 S. W. 394, decided at October term, 1916, in Division No. One. We take it,

however, that where the judgment and record of a Court of Appeals is before us upon writ of *certiorari* we may say (as we have said in paragraph I, supra) that the opinion conflicts, in certain particulars with previous opinions of this court, and yet say that the judgment directed by the opinion should not be quashed, if we find good reason in law for so saying. It is upon this theory that we take up the second branch of this case.

Recovery of
Tax Transmitted
to State
Treasury.

The tax involved herein is a State tax, and we must take judicial knowledge of the fact that in due course of law it has been paid by Mr. Alt, the collector, into the State Treasury. The question thus arises, is a revenue collector for the State (and such was Alt's position: *State ex inf. v. Koeln*, 192 S. W. 748, in the performance of his conceived duties under the law, liable personally or upon his bond for taxes which he has collected and turned over to the State, under the species of duress found in this case. We can well say, as in *American Manufacturing Co. v. City of St. Louis*, 238 Mo. 267, we did say, that the party for whose benefit the unwarranted tax was collected and into whose treasury it went, should refund from that treasury the fund wrongfully collected. But that is not this case. In the 238 Mo., supra, we were making the city return that which it wrongfully received. It must be remembered that the jute butts involved in that case, as also in this, was not all the taxable property of the American Manufacturing Co. This property was but one item of the many. The collector was collecting at least a claim that was for the most part valid and fully valid as he thought and insisted. In the collection of this tax the collector in the one case was the agent for the city and in the other the agent for the State. In this kind of a situation, we think the rule announced in *Lewis County v. Tate*, 10 Mo. l. c. 651, is applicable. It is there said:

"The money thus collected was paid over into the county treasury. Whatever may be the liability of the

county, and of this we are not authorized to give any opinion, it is clear that the collector is not liable. Where money is paid to an agent, for the purpose of being paid over to his principal, and is actually paid over, no suit will lie against the agent to recover it back."

In Mechem's Public Offices and Officers, sec. 694, it is said:

"Where money illegally collected by color of law still remains in the hands of the collector it may be recovered from him by the party paying it, but if it has been paid over by the collector to the proper authorities, he is no longer responsible for it, though it appears that he acted under an authority which was void."

In Cooley on Taxation (3 Ed.), p. 1482, it is further said:

"But in general, if the money, though actually collected by compulsion, is paid over to the proper receiving officer before suit brought, the collector is protected, and this principle has been applied to cases in which the officer's authority was void for unconstitutionality or other reason."

This rule is supported by many cases found cited under the text, and we think it the safe rule. Of course, if the money had been in the hands of the collector at the institution of the suit, a different rule might have applied. But it had long since reached the State Treasury. To hold a collector responsible individually would be a harsh rule and one which we do not care to follow. The Legislature, upon proper application, would no doubt reimburse the plaintiff from the State Treasury.

We do not agree to the opinion of the Court of Appeals in so far as it says that there was a voluntary payment of these taxes, but the judgment entered by that court is a proper one and should not be quashed. The Constitution makes the opinion of the court a part of its record, and we will quash such portion of its record for the reason assigned in our para-

Braeuel v. Reuther.

graph one, but will permit its judgment to stand, because for the right party. It is so ordered. All concur, except *Williams J.*, not sitting, and *Bond, J.*, who dissents on ground of jurisdiction only.

JOHN W. BRAEUEL et al., Appellants, v. JOHN F. REUTHER et al.

Division Two, February 17, 1917.

1. **WILL CONTEST: Death of Contestants: Revivor: Abatement.** When a will contest has once been instituted by persons who have a direct pecuniary interest in the final determination of the question of whether or not there is a will, the burden of proving the will then rests upon the proponents, and the contest must go forward to a final adjudication; and if the contestants die, the action does not abate, and there is no absolute necessity of a revivor in the name of those who have a financial interest in the result, although upon proper application they may be substituted as contestants, but the administrators of the contestants are not proper parties.
2. ———: ———: ———: **Administrator.** Upon the death of the contestants of a will, their administrators should not be substituted as parties. An executor or administrator is not, under the statutes, an interested party to a will contest, either active or nominal. The statute limits the right of action to "persons interested in the probate of wills," and an executor or administrator is not such a person.

Appeal from St. Louis City Circuit Court.—*Hon Daniel D. Fisher*, Judge.

MOTIONS OVERRULED.

Safford & Marsalek for appellants.

Morton Jourdan for respondents.

WALKER, P. J.—Anna Zwingmann died in the city of St. Louis in April, 1912, leaving personal property therein. On April 23, 1912, there was admitted to probate in the probate court of said city a paper purporting to be her last will. In May, 1912, the plaintiffs herein, brothers of the deceased, brought suit in the circuit court of said city to set aside the will on the grounds of fraud, duress and mental incapacity of the testatrix to make a will. At the April term, 1913, of the circuit court of said city a trial was had therein resulting in a finding and a judgment that the paper so admitted to probate was the last will and testament of the said Anna Zwingmann. Thereafter plaintiffs perfected an appeal from said judgment to this court. The case was set for hearing on said appeal on the 19th day of October, 1916, and on that day was taken as submitted. It now appears that both of said plaintiffs are dead, one having died in May, 1915, and the other in July, 1916. On the 7th day of November, 1916, the deaths of the plaintiffs were suggested to this court and a motion was made to revive in the name of their administrator, who, as stated in said motion, had been appointed by the probate court of the city of St. Louis in October, 1916, but was not one of plaintiffs' former counsel in the contest proceedings. A motion to abate the action has been filed by counsel for respondent. These motions will receive consideration in their order.

It is necessary, under the statute (Sec. 555, R. S. 1909) to authorize an action to contest a will, that those who instituted same shall have a direct pecuniary interest in the final determination of the question as to whether the instrument is the last will of the decedent. We said this much in *Watson v. Alderson*, 146 Mo. l. c. 343, and expressive of the same conclusion but in different terms, it was said in *State ex rel. v. McQuillin*, 246 Mo. l. c. 691, that the statutory interest referred to must be a financial interest in the estate and one which would be benefited by setting aside the will; also in *Teckenbrock v. McLaughlin*, 246 Mo. l. c. 719, it was held that generally a direct pecuniary interest at the time of the probate of the will is a condition precedent

to the right to contest; and in *Gruender v. Frank*, 267 Mo. 713, the latest expression of this court on the subject, the language of the preceding cases as to what constitutes an interest within the meaning of the statute is quoted with approval.

The plaintiffs were the sole contestants. So far as the record discloses they were the only persons capable of inheriting from the decedent had she died intestate. The setting aside of the will, therefore, would have injured to their pecuniary benefit and as a consequence they were interested in the devolution of the property of the decedent to such an extent as to authorize them to institute the pending action. Plaintiffs' right to institute the action having been determined, what effect has their death pending the appeal upon this proceeding? If this action is in no wise different in its material features from the ordinary civil proceeding it will survive or continue, and may, upon compliance with our rules of procedure (Art. 10, chap. 21, R. S. 1909) applicable in such cases, be revived in the name of the party entitled to succeed plaintiff in the prosecution of the action. This follows from the language of the statute (Sec. 1916, R. S. 1909), which provides that "no action shall abate by the death, marriage or other disability of a party, if the cause of action survive or continue."

A proceeding to contest a will, however, is possessed of peculiar features; after the will has been probated an action questioning its validity casts upon those who claim under it the burden of proving it. Although the contestants who have brought the action may introduce no evidence and may even abandon the contest, the burden of proving the will still devolves upon those who would maintain it. While they are not required to prove a negative, they must prove the affirmative facts essential to the execution of a valid will. [*Bradford v. Blossom*, 207 Mo. 1. c. 228.] From this ruling, which is but a reiteration of a like doctrine announced in many preceding cases, it follows that the question as to the survival or continuance of actions of this character in the event of the death of parties thereto is eliminated from

the equation. Upon the action being brought the parties thereto become of minor importance, the prime purpose of the proceeding being to determine whether there is a will or not. The importance of this concrete question being paramount, we might well content ourselves with the course that having regularly acquired jurisdiction we will, regardless of the parties and with indifference to the motions filed herein, review the record and render judgment thereon; but it is meet and proper that other questions submitted pro and con in regard to these motions be determined.

The appointment of the administrator of the estates of plaintiffs made below, and the motion filed here to revive in his name, was evidently upon the assumption or theory that in the absence of this course the action would abate. This result would not have followed, as we have shown, on account of the nature of the action and the purpose it seeks to effect. There being no abatement, the motion to revive was therefore without merit.

But viewed from another vantage than that which presents itself on account of the nature of the action, are there other reasons existent for the nominal substitution of the administrator for the plaintiffs?

The purpose of the appointment of an administrator is that he may manage and settle the estate of the intestate. The limit of his power is to be found in the statutes which authorize his appointment. An analysis of these statutes is pertinent. Under section 101, Revised Statutes 1909, the administrator is authorized "to commence and prosecute all actions which may be maintained and are necessary in the course of his administration, and defend all such as are brought against him." A will contest is clearly not within this class. It is in no sense a property right and is therefore not such an action as is authorized to be maintained by the administrator in the course of his administration within the meaning of the section quoted. Being a mere right of action a judgment in the administrator's favor would result in the recovery of nothing more than the establishment of the right. Such is the character of this right

that it is neither assignable nor descendible (*Storrs v. St. Luke's Hospital*, 180 Ill. 368), and as the administrator, if successful in maintaining it, would recover nothing tangible, it was not contemplated by the statute that he bring suit to establish it. As was aptly said by the Supreme Court of Ohio in discussing a correlative question: "An executor or administrator is not a necessary party where there are no debts and no personal property." [*Andrews' Exrs. v. Andrews' Admr.*, 7 Ohio St. 143.] This conclusion accords with reason and it was so held in *Ligon v. Hawkes*, 110 Tenn. 1. c. 521, in construing a statute of that state similar in all of its material features to that under review. An Illinois statute upon the same subject has received a like construction. [*Staude v. Tscherner*, 187 Ill. 19.]

Section 104, Revised Statutes 1909, provides that "executors and administrators shall prosecute and defend all actions commenced by or against the deceased, at the time of his death, and which might have been prosecuted or maintained by or against such executor or administrator." This section simply means that executors and administrators may prosecute and defend such actions as may have been brought by or against the decedent at the time of his death which might have been prosecuted or maintained by or against such executors or administrators. In other words, the class of personal representatives mentioned cannot under this statute prosecute and maintain actions unless they were in a condition to bring a like suit if it had not been brought by the deceased. [*Ferrin v. Kenney*, 51 Mass. 294; *Schreiber v. Sharpless*, 110 U. S. 76.]

Section 105, Revised Statutes 1909, cited by the movers of the motion to revive, has no application to the power of administrators in a case of the character here under consideration. This section authorizes administrators, under the conditions therein named, to prosecute and defend actions for torts to the property, rights or interests of the decedent.

There is therefore neither in the nature of the action to contest a will nor the statutes defining the power of ad-

ministrators any express authority conferred upon them to institute or maintain this character of action. In *Teckenbrock v. McLaughlin*, 246 Mo. l. c. 719, we said that the right to contest a will is statutory and that an interest in the probate of same is essential to the existence of this right. This has ever been the rule in this State. *GANTT*, J., speaking for this court, said in effect in *Stowe v. Stowe*, 140 Mo. l. c. 604, that "wills are creatures of the statute and that proceedings to set them aside are vested exclusively in courts of law and that this rule of construction has been adhered to by this court from *Lyne v. Marcus*, 1 Mo. 410, down to and including the case then under consideration." There has been no variance since in this conclusion. Courts elsewhere have reached the same conclusion. [*United States v. Perkins*, 163 U. S. 625; *Kochersperger v. Drake*, 167 Ill. 122.] The right of action to contest a will being purely statutory, it is therefore in derogation of the common law and hence subject to the rule that its provisions must be strictly construed. Thus construed the procedure prescribed, or in other words the rights granted and the powers conferred, must be limited to the express terms of the statute. Thus limited there is an absence of authority in an administrator to either institute or maintain a suit to contest a will.

If, however, another well established rule of statutory construction be invoked, viz., that remedial statutes are to be liberally construed (*Rozelle v. Harmon*, 103 Mo. 339, 12 L. R. A. 187) and it be conceded that the statute in regard to the contest of wills is within this class, then upon a reference to its express terms we find that "only persons interested in the probate of wills" can be made parties to contests of same, and bearing in mind the character of this interest, as frequently defined by this court, the conclusion follows that although the statute may be remedial in its nature and hence subject to liberal construction, such construction cannot extend beyond its plain terms (*Caldwell v. Renfro*, 99 Mo. App. 376), which limit the right of action to those named.

A persuasive ruling in support of this conclusion is to be found in the determination of an analogous question

in the case of *In re Estate of Soulard*, 141 Mo. 642. There the court, in passing upon the question as to the liability of an estate for expenses incurred in a will contest, said in effect that "the executor of a will is entitled to be reimbursed out of the estate for necessary expenses incurred by him in having the will probated, but expenses incurred in the circuit court growing out of a contest of the will should be paid by the parties interested in that proceeding, viz., the heirs or the legatees." If the estate is not to be burdened, as is held in this case, with expenses of litigation of this character, it would seem to follow that the executor or administrator should not be made even a nominal party. His presence in the proceeding adds nothing to its progress or purpose; and, to employ a homely simile, he would constitute "a fifth wheel" in the chariot of procedure.

The rulings of courts of last resort in other jurisdictions in similar cases add force to the correctness of the conclusion here announced. In *Diffenderffer v. Griffith*, 57 Md. 81, the court held, in a case involving the validity of a will, that the trial court upon the suggestion of the death of one of the contestants had no power to substitute a new party in the place of the deceased, but that the survivor could effectively proceed in the trial of the issue; that the right to prosecute a suit to contest a will did not devolve upon the executor or personal representative of the deceased, because the latter's right in this regard was purely personal and died with him; and that it was not incumbent upon the personal representative to participate in the proceedings, so far as any duty to the estate of the deceased was concerned. This ruling was based on the absence from the Maryland code, as is the case here, of any authority for substituting parties to suits in proceedings of this character. In California various phases of the question here involved have received consideration. In *Roach v. Coffey*, 73 Cal. 281, it was held that an administrator cannot represent either side of a contest between heirs, devisees or legatees contesting the distribution of the estate. In the case of *In Re Sanborn*, 98 Cal. 103, and

that of *In Re Hickman*, 101 Cal. 609, the court held that an administrator, as such, has no interest in the estate other than to discharge the duties devolving upon him under the law. In *Bates v. Ryberg*, 40 Cal. 463, which is cited with approval in the *Matter of the Estate of Marrey*, 65 Cal. 287, the court held that an executor cannot maintain an appeal from an order of distribution of the assets of an estate on the ground that the property was improperly divided between the legatees. In the case of *Storrs v. St. Luke's Hospital*, 75 Ill. App. 152, it was held that the right to contest a will should be limited to persons interested therein; that this was a personal privilege and when they died the effective force of the statute, so far as they were concerned, died with them; that it did not descend to their heirs nor survive to their administrators (citing cases).

Our conclusion being evident that the substitution of an administrator is not necessary in the event of the death of a contestant in cases of this character, the question naturally arises as to who will represent the interests of such contestants in the event of their death pending a proceeding, as in the case at bar. We have heretofore indicated in discussing another phase of this matter that such representation is not necessary. The purpose of the proceeding is to determine whether or not there is a will. The contestants under our law are mere instruments in effecting this purpose, and the suit having been brought by them cannot be dismissed, but must be finally determined although the contestants acted voluntarily in the first instance in bringing the action. Having so acted their powers cease except to see that the proponents establish the will. Whether, however, they see to this or not is a matter of indifference, because the action having been begun the duty devolves upon the trial court to see that it is finally determined, and this rule has a like application when cases of this character reach this court upon appeal. From this it follows that the motion to revive in the name of the administrator should be overruled.

The reasons stated in support of this conclusion are a sufficient answer to the motion filed by respondents here-

Bingaman v. Hannah.

in that the action should abate. Even if the action had been improperly brought so far as the parties plaintiff were concerned, we have held that proper parties in interest might be substituted therefor on the ground that such substitution did not change the nature of the action but simply properly submitted the issues for the court's consideration. It was so ruled in the case of Lilly v. Tobbein, 103 Mo. 477. The motion to abate is therefore overruled.

Under the ruling in the Lilly-Tobbein case others who have such an interest in the probate of the will herein as is defined by the statute may, upon proper application therefor embodying a satisfactory showing of such interest, be made parties plaintiff hereto; but whether such application is made or not the court having acquired jurisdiction will finally determine the matter at issue. All concur.

W. R. BINGAMAN et al., Appellants, v. J. M. HANNAH et al.

Division Two, April 10, 1917.

1. **WILL CONTEST: Testamentary Capacity.** Where if the contestants' evidence is to be believed the testator was without sufficient mind to make a will, and if the evidence for proponents is to be believed he had mind sufficient to make a will, the question of his testamentary capacity is one of fact to be decided by the jury.
2. ———: **Due Execution of Will: Knowledge of Contents.** Where there is substantial evidence that testator was possessed of testamentary capacity and the uncontradicted evidence is that the will was read aloud to him, the proper conclusion is that he knew its contents before he affixed his mark to it.
3. ———: ———: **Witnessing: At Request of Testator.** The statute does not require that the testator shall verbally request the subscribing witnesses to attest his will, and the will cannot be destroyed on the sole ground that he did not himself make such request. If after the will was read aloud to testator and he had announced his assent thereto and had affixed his mark to it, the scrivener, in

Bingaman v. Hannah.

his presence and hearing, requested two competent persons to subscribe their names as witnesses, and they did so in testator's presence, the attestation met the requirements of the statute.

4. **MOTION TO STRIKE OUT ANSWER: No Exception.** An assignment that the trial court erred in overruling contestants' motion to strike out proponents' amended answer on the ground that it contradicted the original answer, cannot be reviewed on appeal unless an exception was saved to the ruling and the exception and the motion itself were preserved in a bill of exceptions.
5. **WITNESS: Ruling of Incompetency: No Offer of Testimony.** The ruling of the trial court that a certain witness offered by appellants was incompetent to testify will not be reviewed on appeal unless the ruling was followed by an offer to prove what the witness's testimony would be if he were permitted to testify.
6. **WILL CONTEST: Subscribing Witnesses: Cross-Examination.** Where the subscribing witnesses manifest an unwillingness to testify to the mental condition of the testator at the time he subscribed the will, the trial court does not abuse its discretion by permitting proponents to cross-examine them, though their own witnesses, by asking them if they had not sworn in the probate court, upon the original probate of the will, that testator was of sound mind at the time he signed the will.
7. **——: Subscribing Witnesses: Instructions: Knowledge of Testator: Presence.** The instructions should clearly convey to the jury the idea that in order to find that the will was properly witnessed they should find that it was signed by subscribing witnesses in the presence of the testator and with his knowledge and consent. The word "presence" necessarily includes knowledge of the act and acquiescence therein by the testator, and they can be shown in different ways, namely, by his verbal request, or by any act or conduct upon his part, or by any other evidence which would show that he had knowledge of the attestation and consented to or acquiesced therein.

Appeal from Wright Circuit Court.—*Hon. C. H. Skinker, Judge.*

AFFIRMED.

J. N. Burroughs for appellants.

(1) Where there is no evidence tending to show that the testatrix had any knowledge of the contents of the will as drawn, and where it does not dispose of her property as she had desired and had directed, it will be

Bingaman v. Hannah.

held that it was not the will of the testatrix. *Bradford v. Blossom*, 207 Mo. 207. (2) The burden is on the proponents to prove the due execution of the will and that the testator had mental capacity to know and understand what he was doing. That burden they must assume, even though contestants introduced no evidence. *Cowan v. Shaver*, 197 Mo. 203. (3) The provision of the statute which requires that every will shall be signed by the testator or by some person by his direction is mandatory; and if it is not complied with, the will is void. *Hospital Assn. v. Williams*, 19 Mo. 609; *Simpson v. Simpson*, 27 Mo. 288; *Elliott v. Welby*, 13 Mo. App. 19; *Catlett v. Catlett*, 55 Mo. 330; *Walton v. Kendrick*, 122 Mo. 504. (4) In order to make a will valid the witnesses must sign the instrument by request of the testator. *Miltenberger v. Miltenberger*, 78 Mo. 27; *Elliott v. Welby*, 13 Mo. App. 19. (5) Upon the issue of *devisavit vel non*, the court should take the proof and establish or reject the will. *McMahon v. McMahon*, 100 Mo. 99; *Benoist v. Murrin*, 48 Mo. 48; *Jackson v. Hardin*, 83 Mo. 184; *Hughes v. Burriss*, 85 Mo. 665; *Bradford v. Blossom*, 207 Mo. 228. (6) The motion of plaintiffs to strike out the amended answer of defendants was well taken and should have been sustained. The amended answer was directly and absolutely contradictory of the original answer. It was a stultification of defendants and is not permitted under the law. An admission contained in a pleading is conclusive on the pleader. *Kessner v. Phillips*, 189 Mo. 528. Where the answer contains a general denial, there can be no implied admission of any fact stated in the petition. *State to use v. Samuels*, 28 Mo. App. 649. (7) Husband of a wife interested in setting aside a will is a competent witness in the cause. *Roberts v. Bartlett*, 190 Mo. 703. (8) It was error to permit defendants to ask the subscribing witnesses whether they had not sworn in the probate court that the deceased was of sound mind. It was also error for the court to refuse the instruction excluding evidence of the probating of the claimed will.

Green, Wayland & Green for respondents.

(1) The influence of a wife or child upon a testator will not avoid the will, if the influence is exercised or exerted in a reasonable manner without fraud or deception. *Crowson v. Crowson*, 172 Mo. 691; *Thompson v. Ish*, 99 Mo. 160; *Maddox v. Maddox*, 114 Mo. 35; *Bonsal v. Randall*, 192 Mo. 525; *Seibert v. Hatcher*, 205 Mo. 97. This testimony of the declarations of the testator was proper, for the reason that it showed a fixed and definite purpose of long standing on part of the testator to give his wife the property in controversy. *Jones v. Thomas*, 218 Mo. 508. (2) Instructions numbered 4 and 11, complained of as error by plaintiff, were authorized by *Seibert v. Hatcher*, 205 Mo. 97, and *Hughes v. Rader*, 183 Mo. 630. (3) The court did not err in overruling plaintiff's motion to strike out amended answer of defendants, and if error, it would warrant a judgment for plaintiffs, or a reversal for a new trial. Under the general denial the affirmative of every allegation of the petition (except as to whether or not the writing in question was in fact the decedent's last will and testament, the execution of same and the mental capacity of the testator at the time of its execution), would have rested upon the plaintiffs. *Bradford v. Blossom*, 207 Mo. 177; *Harris v. Hays*, 53 Mo. 90; *Sehr v. Lindemann*, 153 Mo. 276; *McFaddin v. Catron*, 120 Mo. 252; *Cowen v. Shaver*, 197 Mo. 203. Every issue in this case could have been tried under the general denial. A majority of will contests are tried on answers of general denial. *Hogan v. Kinchey*, 195 Mo. 530. "Amendments are favored and should be liberally allowed in favor of justice." *House v. Duncan*, 50 Mo. 453; *Carr v. Moss*, 87 Mo. 447. "The discretion of the trial court will not be interfered with on appeal unless it is manifest that it has been abused." *Carr v. Moss*, supra. (4) Under Sec. 6354, R. S. 1909, it is held that "If the wife (or husband) is a party to the suit and has a real interest in the subject which would be affected by the judgment, then she (or he) is a competent witness." *Layson v. Cooper*, 174

Bingaman v. Hannah.

Mo. 223; Dunifer v. Jecko, 87 Mo. 285; Stefen v. Bauer, 70 Mo. 399; Wood v. Bradley, 76 Mo. 33; Bell v. Railroad, 86 Mo. 73; O'Brien v. Allen, 95 Mo. 73. To qualify either to testify, he or she must be not only a party in the suit, but must have a real interest in the subject which would be affected by the judgment. Fugate v. Pierce, 49 Mo. 441; Hariman v. Stowe, 57 Mo. 93; Scrutchfield v. Santer, 119 Mo. 615. (5) Testator had sufficient mental capacity to make the will. Sehr v. Lendemann, 153 Mo. 288; Hamon v. Hamon, 180 Mo. 701; Holton v. Cochran, 208 Mo. 314; Riggins v. College, 160 Mo. 570; Weston v. Hanson, 212 Mo. 248; Hughes v. Rader, 183 Mo. 63. (6) The will was properly executed. "The mere fact that one of the beneficiaries, who drew the will, requested the attendance of the witnesses, and the fact that testatrix does not proclaim the paper to be her last will and testament, nor verbally request the witnesses to attest it, are not sufficient to annul the will on the ground of non-compliance with the statute." Hughes v. Rader, 183 Mo. 630; Lindsey v. Stephens, 229 Mo. 615.

WILLIAMS, J.—This is a suit to contest the alleged will of Henry H. Bingaman, deceased. By the alleged will said Bingaman (for brevity we will hereinafter refer to him as the testator) devised and bequeathed practically all of his property consisting of sixty acres of land and about four hundred dollars worth of personal property, to his wife Belle Bingaman. Testator died on the 29th day of June, 1909, and left no children surviving him. Testator's wife died in 1911, and shortly afterwards this suit was instituted by the heirs of the testator against the defendants who are the heirs of Belle Bingaman. Trial was had before a jury, in the circuit court of Howell County, which resulted in a verdict and judgment establishing the will. Thereupon plaintiffs duly perfected an appeal.

The appeal was first taken to the Springfield Court of Appeals, but that court, on the theory that the title to real estate was involved, certified the case here.

The evidence upon the part of the defendants tends to establish the following facts:

On the 25th day of June, 1909, the day the will was written, testator's brother, William Bingaman, informed C. H. Cobb, a lawyer and notary public, that he was wanted at the testator's home to prepare a will. Mr. Cobb thereupon went to the testator's home and after talking with testator's wife, out of the presence of testator and without consulting the testator, drew the will. After drawing the will, he, together with other persons, went into the room where testator lay sick and thereupon read the will to the testator. Thereupon testator's wife stated that everything went to her and the testator nodded his head and "seemed" to consent. Testator's wife and one Bud Hannah then raised the testator up in bed, whereupon the testator, with the assistance of Mr. Cobb and those around him, made his mark on the will. It appears that the testator was not able to speak and he did not request the subscribing witnesses to sign the will. In fact he made no audible remarks concerning the transaction. Mr. Cobb, in the presence of the testator, and in his hearing, did request C. S. Hill and J. B. Blackford to sign the will as witnesses, which they did in testator's presence. In answer to question, Mr. Cobb said that he did not know the mental condition of the testator at that time, because he did not have any conversation with him; that he seemed to be a very sick man, but that the witness couldn't say as to his mental capacity. Over the objection of plaintiffs, Mr. Cobb was permitted to testify that at the original probate of the will he had testified that the testator was of sound mind.

C. S. Hill, one of the subscribing witnesses, testified that he was in the sick room about an hour and one-half just before the will was signed; that testator asked for a bed pan, speaking in an audible tone; that this was the only remark that testator made during the time that witness was in the room. After the will was read the witness heard testator's wife ask him if he wanted her to have everything and testator nodded his head, indicating yes. Witness signed the will, at the request of

Bingaman v. Hannah.

Mr. Cobb, in the presence of testator. Witness stated that he was unable to testify concerning testator's mental capacity, but admitted that at the original probate he testified that testator was of sound mind at the time the will was made.

J. B. Blackford testified that he signed the will as subscribing witness upon the request of Mr. Cobb, in the presence of the testator; that the will was read to the testator and that the witness did not hear the testator make any objections to it. Witness didn't know whether testator recognized him when he first went into the room, but stated that he thought he did and that the testator held out his hand and shook hands with him, but nothing was said. When the witness left he said good-bye to the testator, but testator made no reply, the witness saying that testator seemed to appreciate it but didn't say a word. The witness said he could not say as to the mental condition of the testator.

Dr. R. S. Spears testified that he attended the testator during his last illness, visiting him once or twice daily during the latter part of his illness; that testator was suffering from diarrhea and was passing mucus and a little blood. On the day the will was written, testator's bowels passed frequently, but the testator talked freely and "seemed to realize that he was not getting on." The doctor testified that he asked the testator the questions that he usually asked a patient and that he seemed to realize all that was going on; that his temperature was approximately 102 degrees. The doctor was at the testator's home twice on the day the will was drawn, first about ten o'clock in the morning and later about five o'clock in the afternoon. The witness further said that all through his sickness the testator's mind was "exceptionally clear," considering he was such a sick man; that there were times when opiates had to be administered to him, "but when we did arouse him his mind would be clear; after you let him sleep, he was like any other man under the influence of medicine." On cross-examination this witness testified that about two days before the will was written, testator's brother, Bill

Bingaman v. Hannah.

Bingaman, asked him if he thought testator was capable of making a will. The doctor replied that he thought he was, and told him that he would ask Dr. Thornburgh what he thought about it. He thereupon went to the buggy where Dr. Thornburgh was and stated: "Mr. Bingaman has asked me if I think Henry is capable of making a will and I answered that I thought he was. What do you think about it? Dr. Thornburgh replied, 'Certainly he is capable of making a will' and remarked that he never saw a man as sick as Henry was that had as clear a mind."

Mrs. Belle Breedlove, a cousin of the testator, testified that she saw testator on the day the will was written; that he shook hands with her and seemed to recognize her, but did not speak.

Dr. A. Simon, a retired physician, visited testator the day the will was written. He testified that as he went into the sick room testator nodded his head and reached out his hand and shook hands with him. In reply to a question asked by the witness as to how the testator was feeling he replied, "Pretty bad." The witness said he didn't know anything about the mental condition of the testator.

John Mahann sat up with testator the night after the will was made. Testator spoke to witness when he went into the room and shook hands with him. Witness said, "Howdy," and testator replied, "Howdy, John." Witness then asked him how he was getting along and testator replied that he was in "pretty bad shape."

W. T. Clark testified that he also sat up with testator on the night after the will was drawn and that testator recognized him and recognized any body that came into the room. Witness did not speak to testator after he went into the room, but said that whenever testator wanted "the vessel" he would throw up his hands and make a sign.

E. P. Riddle testified that he was at testator's home until about noon on the day the will was drawn and that testator's mental condition seemed to be good and that

Bingaman v. Hannah.

he seemed to know everything. This witness heard a conversation that morning between Billy Bingaman and testator about going after a notary public to draw the will, in which conversation testator's brother said, "How will Hence Cobb do?" To which testator replied, "He will do." This witness further said that, the fall before, testator told him that he intended to give what he had to his wife. On cross-examination this witness testified that it was about sunrise when he first went into the sick room and he there found testator's wife crying. "She told him [testator] that if he hadn't said anything about it, she wouldn't have mentioned it for the world. That was the first remark I heard when I went in. He said, 'When Billy comes, you tell him what you want.'"

Defendants introduced evidence that testator was over fifty years old at the time of his death and that this suit was instituted May 29, 1911.

The evidence upon the part of the plaintiffs was substantially as follows:

Dr. A. H. Thornburgh testified that on the 23rd day of June he visited the testator as consulting physician with Dr. Spears, and from that time on he visited the testator once or twice a day; that on the 23rd day of June testator was suffering from painful, bloody diarrhea and extreme exhaustion; that they administered hypodermic injections of morphine for the pain and some strychnine and bismuth and pepsin; that on the 25th day of June (the day the will was written), testator was much weaker physically; that the disease had produced a condition called "shot," which had a tendency to greatly lower the mental activity and that mentally the testator was "indifferent, sluggish and cloudy and had to be aroused to get him to notice anything;" that "a man in that state might be aroused, if spoken to directly or by calling him by name, and he might know you and perhaps he would answer your question; perhaps in a moment he would have forgotten it, in other words, his surroundings would make no impression upon him, and the man or woman who passed through that condition, if they recover, may have no memory for perhaps days of

Bingaman v. Hannah.

what passed during their sickness, yet during their sickness they may be able to answer questions and perhaps recognize people. As a matter of fact a man or woman in that condition has no power of discernment. It begins with a cloudiness of the mind, and perhaps a muttering and delirium of the mind, and as the disease progresses, the patient sinks more and more and passes into a semi-comatose state and finally sinks into coma, from which the patient is aroused with difficulty, and finally dies with exhaustion." That during the first three days the doctor visited testator they gave him enough morphine and opiates to quiet the pain and that this would tend to lessen the power of concentration and judgment. The following question was asked and answer made: "Q. On the 25th of June, in your judgment did Henry Bingaman have sufficient mental capacity to understand the nature and extent of his property and to get in mind his various relatives and those to whom he desired to give and did give his property, if he had been called upon to make a will without the aid or suggestion of any other person? A. I don't think he had." On cross-examination this witness stated that he may have said to Dr. Spears the following: "He may be capable of making a will, but I doubt his ability to do it without outside influence or direction;" and that he said to Dr. Spears, "I think we have a very sick patient. It seems to me that if he has any business that he wants to transact, he ought to be doing it right away." The witness did not remember that he told Dr. Spears that the testator was "thoroughly competent to make a will."

Mrs. John Spencer and Mrs. Mart Cooper, nieces of the testator, testified that they went into the sick room at nine o'clock on the morning of the day the will was made, but that testator didn't recognize them and that they didn't think him competent to transact business at that time.

C. B. Faurot testified that he sat up with testator the night before the will was made. In response to an inquiry testator told the witness that he was feeling "pretty tough." That testator knew the witness and

Bingaman v. Hannah.

Ben Skinner, but seemed to be in a stupor most of the time. The witness did not think him capable of attending to any business. Whenever the testator desired attention during the night he would make a motion with his hand.

Miss Laura Homringhausen testified that she was a professional nurse and that she went to the home of the testator two days before he died (this was two days after the will was made). Testator was then in a state of coma at intervals. His bowels moved twenty or twenty-four times that night. The nurse would arouse him to give him medicine and the patient would arouse himself when he needed attention. Sometimes he would not arouse himself when he needed attention and, as a result, the bed clothes had to be changed several times during the night.

Bert Hollingshad testified that he worked at testator's home eight or nine days before his death; that on the morning of the day the will was drawn, witness went into the sick room and asked the testator how he felt and that testator "kinda rolled his eyes up," looked at witness and said, "I don't know you." He didn't think testator was able to transact business that morning. Witness further testified that one morning prior to this time testator's wife said, "You folks go ahead and eat breakfast, I am going in and talk to Henry about making a will." Later the witness went into the sick room where testator and his wife were talking about a will and heard the testator say, "I don't want to make a will, right now at the present." That his wife said. "I'd rather you would have some body come out and have a will made out so I would be safe." This was three days before the will was made.

Ben Hollingshad testified that after testator's death he had a conversation with testator's wife in which she told him that she had often tried to get her husband to make a will before he did and that at last she told him she was going to have a will made and "they sent for Mr. Cobb." This witness testified that he had another conversation with testator's wife shortly prior to her

death in which she told the witness that she "was about to get into trouble over this will and she was figuring on transferring this property to her brother Robert Hannah." She asked the witness what he thought about it and he advised her that he did not believe she could "head off litigation" that way.

Mrs. Sarah Howell testified that she had a conversation with Belle Bingaman after testator's death in which testator's wife stated that she came very near being left without plenty and that she saw that if she didn't stay with her husband and watch him pretty close that he would not make a will; that she hired a girl to do the work and that she and her brother waited on testator and that she didn't believe her husband would have made a will had testator been left with the Bingamans.

Mrs. Dave Willis testified that she had a conversation with Mrs. Bingaman after her husband's death in which she stated that when she first began talking to testator about making a will he stated, "I have got no will to make;" that she kept talking to him about it until he finally agreed to it and they sent and got a man to draw the will; that she and her brother stayed with testator day and night to keep the other folks away, and that if this had not been done testator would never have made a will.

S. J. Galloway testified that four or five days before the will was made some people whom testator had known all his life called to visit him. After they had gone testator whispered to witness, "Who are those boys?" Witness did not think testator competent to transact business. Three or four days before the will was made testator's wife sent for the witness to come and talk to her husband about making a will. The witness went into the sick room and said, "Henry, I don't want to alarm you, but you are a very sick man, you may live longer than me, but we haven't the promise of another day; I want to know if there is anything that bothers your mind; have you a will made; do you want to make a will?" To this testator replied, "No, I don't." After the testator's death the witness saw his wife in town and

Bingaman v. Hannah.

she said to witness, "Old man Willis is here; he is here to break up the will or destroy it; he is here to make me trouble." Witness replied, "Maybe not." She then said, "You will see that is what he came for." She then asked the witness to go and see what Mr. Cobb would say about testator's being in his right mind when the will was made. On cross-examination the witness testified that Billy Bingaman married his sister.

John Bingaman testified that testator was over sixty years old at the time of his death and always wrote his own name. The witness was at testator's home the days the will was drawn. He did not think testator competent to transact business that day. On cross-examination this witness testified as follows: "Cobb drew up the will on the back porch; she [testator's wife] went into the room, got a chair and sat down by his [testator's] head and said, 'Now Henry, you want me to have everything you have got, don't you Henry?' Then Mr. Cobb said, 'Real estate and personal property.' Then she said, 'Yes, Henry, everything.' Then he nodded his head, you could barely tell that he nodded his head. Henry never said a word; in my judgment and opinion, he neither knew or understood what was going on." Q. "When the question was asked him, real or personal, he nodded his head; don't you think he knew what was said? A. He might have known what she said. We were willing for her to have all the property as long as she lived; there was sixty acres of land worth fifty dollars an acre, and personal property of four hundred dollars."

William Bingaman testified that he was a brother of the testator and that he was there when the will was drawn, but was not in the room when it was signed; that five or six days before the will was drawn testator told the witness that his wife had been trying to get him to make a will, but stated that he was not going to make one. He stated further that if he were going to make a will he would give her all of his personal property, but that as far as the real estate was concerned he would let the law provide for that. The witness further testified that one morning Mrs. Bingaman asked him to talk

Bingaman v. Hannah.

to testator about making a will. Witness refused, saying he could not do it on account of the condition testator was in. She thereupon asked witness to see Sam Galloway about talking to testator and that witness saw Galloway that day. The witness admitted that upon the request of testator's wife he went to see Mr. Cobb to inform him that they wanted him to make a will. The witness denied the conversation between him and testator as narrated by witness Riddle. The witness was further permitted to testify that he rode to town that day with Mrs. Sweeney, and that he told her that testator was a very sick man, but that he did not remember saying that the testator did not have a degree of fever that morning and that he was conscious and seemed to know everything and recognize everybody.

In rebuttal defendants offered the following testimony. Mrs. Ida Sweeney testified that she rode to town with William Bingaman on the 25th day of June, 1909, and that he told her that the doctor had told him that the testator hadn't even a degree of fever that morning; that he was going to town to get Hence Cobb to come out and write the will; that Henry was conscious and seemed to know everything and recognize everybody.

Mrs. Sadie Crouch testified that she was present with Mrs. Bingaman all the time that Mrs. Bingaman was at Ben Hollingshad's and that the conversation which witness Ben Hollingshad related as occurring between him and Mrs. Bingaman, about deeding the property to Mr. Hannah, never occurred.

Robert Hannah testified that he stayed at testator's during most of his last sickness, and that he heard the conversation between Billy Bingaman and the testator wherein they agreed that Hence Cobb would do as well as anybody to write the will and that in that conversation William Bingaman said to testator, "I will go to town and get Hence Cobb to come." The witness said he could not see any difference in the mental condition of the testator that morning from what it had been all the time; "he knew everything—all about everything—

Bingaman v. Hannah.

and he knew everybody all the time and he always made his wants known."

Mrs. Jane Taylor testified that she was a sister of Belle Bingaman and stayed at testator's several days before his death; that he knew "everything and everybody" and the witness never noticed any change in testator's mental condition.

Dr. Spears was re-called and testified that in July, 1912, Dr. Thornburgh asked him if he was going to Hartville court and that he replied, "Yes, it seems to me foolish; there is no doubt in my mind of the man being capable of making a will." He said, "He might have been capable of making a will, but in his weakened condition of mind, he would have been easily influenced."

Plaintiffs in rebuttal re-called Ben Hollingshad who testified that at the time Belle Bingaman had the conversation with him about deeding the property to Robert Hannah, Sadie Crouch was not present, but was out in the kitchen talking to the witness's wife.

William Bingaman re-called by plaintiffs testified that the testimony of Bud Hannah and Mrs. Taylor as to the alleged conversation between witness and testator, on the morning that the will was drawn, about going after Cobb, was untrue.

Plaintiffs then introduced in evidence defendants' original answer which was a general denial.

I. As we gather it from their brief, appellants' main contention is that the court erred in overruling their demurrer to the evidence, offered at the close of the case.

In this behalf they insist that there was no sufficient evidence (1) of testamentary capacity or (2) of the due and proper execution of the will.

First, as to point (1) above: Was there sufficient evidence of testamentary capacity to justify the submission of that question to the jury? It will serve no useful

purpose to here repeat the evidence detailed in the foregoing statement of facts.

**Testamentary
Capacity.**

A careful review of the same will disclose

that if appellants' evidence is to be believed the testator was without sufficient mind to make a will. If, on the other hand, the testimony of respondents' witnesses is to be believed the testator did have mind sufficient in this regard. Under such conditions this question of fact was therefore one for the jury's determination. [Heinbach v. Heinbach, 262 Mo. 69, l. c. 82-3.]

Now, with reference to point (2) above: Was there evidence of the due and proper execution of the will? In determining the correctness of a ruling on a demurrer to

**Due Execution
of Will.** the evidence the opposite party's evidence is taken as true and every favorable and reasonable inference arising

from the evidence is to be allowed. Assuming then, as justified by respondents' evidence that testator was possessed of testamentary capacity, he must have known the contents of the will before he affixed his mark thereto, because from the evidence it appears that the will was read aloud to him before he signed the same. The only other matter remaining for discussion under this point is with reference to the sufficiency of the testimony to establish the proper witnessing of the will by the subscribing witnesses. Appellants contend that there is no evidence that testator verbally requested the subscribing witness to sign the will. In this statement appellants are correct. However, we know of no rule, in this State, that requires that the testator shall verbally request the attestation by the subscribing witnesses. The statutes of some of the states do so require. [Remsen on the Preparation & Contest of Wills, page 354.] But the Missouri statute (Sec. 537, R. S. 1909), in this regard, merely provides that the will "*shall be attested by two or more competent witnesses subscribing their names to the will in the presence of the testator.*" (Italics ours).

In the case at bar it appears that after the will had been read to the testator and he had nodded his assent thereto and affixed his mark, Mr. Cobb, in the presence and hearing of testator, requested the subscribing witnesses to sign the will, which was, by them, accordingly done in the presence of the testator. Under the authori-

Bingaman v. Hannah.

ties this was certainly sufficient evidence to establish the fact that the will was properly attested by the two subscribing witnesses. [Cravens v. Faulconer, 28 Mo. 19; Mays v. Mays, 114 Mo. 536, l. c. 541; Hughes v. Rader, 183 Mo. 630, l. c. 701, and cases therein cited; Lindsey v. Stephens, 229 Mo. 600, l. c. 615 et seq.]

The court did not err in overruling the demurrer to the evidence.

II. It is next contended that the court erred in overruling appellants' motion to strike out respondents' answer, on the ground that the amended answer contradicted the original answer.

**Motion to
Strike Out.**

The alleged motion did not undertake to perform the function of a demurrer. It was purely a matter of exception which could be preserved only in the bill of exceptions. The motion itself is not in any manner preserved in the bill of exceptions and, for that reason, an appellate review of the same is precluded. [Shohoney v. Railroad, 231 Mo. 131, l. c. 153.]

III. Appellants offered as a witness B. F. Skinner, husband of one of the plaintiffs. Prior to being offered as a witness he had, upon motion, been made a party plaintiff. Upon objection being made, by defendants, the court held that he was incompetent to testify in the case. This is assigned as error.

**Witness's
Competency.**

After the ruling as to incompetency was made, it appears that the matter was then abandoned and no offer of proof was made, indicating what the witness's testimony would be if he were permitted to testify.

Under this condition of the record the point as to the witness's competency becomes a moot question, and therefore one which is unnecessary to determine. This because—even though we should decide that the witness was competent—we would still be unable to hold that the trial court committed reversible error unless it should further appear that proper and material testimony was also thereby rejected. Absent an offer to prove, we have no way of determining whether proper evidence was re-

jected. We, therefore, express no opinion as to the competency of the witness.

IV. Appellants contend that the court erred in permitting the respondents to cross-examine two of their own witnesses (the subscribing witnesses), by asking them if they had not sworn in the probate court, upon the original probate of the will, that the testator was of sound mind when the will was made.

It appears from the evidence that the subscribing witnesses were unwilling to testify as to the mental condition of the testator; this, no doubt, gave the trial court ground for the belief that they were in a sense hostile or unwilling witnesses. Under such circumstances, the trial court in the exercise of a sound discretion may permit the party to cross-examine his own witness, at least to the extent here permitted. [State v. Duestrow, 137 Mo. 44, l. c. 84-5; Ashby v. Gravel Road Co., 111 Mo. App. 79, l. c. 83; State v. Draughn, 140 Mo. App. 263, l. c. 267-8.]

We do not consider the action of the trial court in this case as an abuse of that discretion.

V. Respondents' instruction numbered 4 is not erroneous because it told the jury that it was not necessary that testator verbally request the subscribing witnesses to sign the will. Instructions 4 and 11 clearly conveyed to the jury the idea that in order to find that the will was properly witnessed they should find that it was signed by the subscribing witnesses in the presence of the testator and with his knowledge and consent.

The statute, as above mentioned, merely requires that the subscribing witnesses sign the will "in the presence of the testator." Of course, the word "presence" necessarily includes knowledge of the act and acquiescence thereto upon the part of the testator. This knowledge and acquiescence upon the part of the testator can be shown in different ways, viz.; by verbal request upon the part of the testator or by any other act or conduct

Lumber Co. v. Railroad.

upon the part of the testator or other evidence which would show that testator had knowledge of the attestation and consented or acquiesced therein. [See authorities cited under paragraph one above.]

The case of Miltenberger v. Miltenberger, 78 Mo. 27, cited and relied upon by appellants, does not hold that a request upon the part of the testator is a necessary prerequisite to the right of the subscribing witness to attest the will. In that case the will was written in a language not understood by the testatrix, and the fact that the testatrix did not request the witnesses to sign the will was commented upon, in an argumentative way, by the court, as merely showing an absence of knowledge upon the part of the testatrix that she was making a will. The proof of the execution of the will was held to be defective, not because the testatrix failed to verbally request the witnesses to sign it, but because there was an absence of any proper evidence that testatrix knew that the instrument she signed was in fact a will.

The judgment is affirmed. All concur.

**FOSTER LUMBER COMPANY v. ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY et al.,
Appellants.**

Division Two, April 10, 1917.

1. **INTERSTATE SHIPMENTS: Governed By U. S. Laws.** The liability of a common carrier upon contracts concerning interstate shipments is governed by the Interstate Commerce Act and amendments thereto; and the construction of that act by the Federal courts is conclusive upon State courts.
2. ———: **Bonus or Refund on Interstate Shipments for Increase in Business.** A contract between a lumber company, about to locate large mills, and a railroad company desiring to have them located upon its lines in order that it might receive the manufactured lumber for shipment and the increase in traffic which would result from the building up of a new town, by which the railroad company agreed

Lumber Co. v. Railroad.

in consideration of the erection of the mills at a designated point on its lines, to give to the lumber company an amount equal to half of the freight charges received by the railroad on interstate shipments of machinery and materials that went into the construction of the plant, was in violation of the Interstate Commerce Act, even prior to the amendment of 1906, whether said amount to be given or paid be considered a bonus graduated on the amount of shipments done, or a refund or drawback on rates paid, or reduced rates.

3. ———: ———: **Other Inducements: Promotion of Public Enterprises: Device.** The contention that the giving to a lumber company an amount of money equal to one half the freight charges received on all materials that went into the construction of its big mills in consideration of its location of its plant along the line of defendant's railroad, was not a rebate or drawback in freight rates, but merely the promotion of a public enterprise which would redound to the prosperity of the railroad, namely, the aiding in building up a town which would grow in public importance, with consequent demands for increased freight and passenger transportation, cannot be sustained, because the Interstate Commerce Act prohibits any device or indirect method of enforcing higher charges against one shipper than another, and has for its chief design the prevention of any discrimination among shippers that, by reason of rebates or draw-backs and the advantages derived from them, will enable large dealers to crush out or cripple smaller competitors who have no such advantages; and a bonus to a favored shipper is a discriminatory device.
4. ———: **Evidence: Established Rates.** A stipulation in the agreed statement of facts that the rates charged and paid by the shipper were the "regular, published tariff rates" is evidence that the rate the shipper paid was the "legally established and published rate" and sufficient in an action arising on account of a discrimination in violation of the Interstate Commerce Act, although there was no evidence that the rates were filed with the Interstate Commerce Commission and posted.

Appeal from Jackson Circuit Court.—*Hon. W. A. Thomas*, Judge.

REVERSED.

Thomas R. Morrow, Cyrus Crane, George J. Mersereau and John H. Lathrop for appellants.

(1) The alleged agreement or arrangement by which the railway companies were to pay to the lumber company

Lumber Co. v. Railroad.

one-half of their proportion of the interstate freight charges on the shipments in question, constitutes one of the devices prohibited by the Interstate Commerce Act, and by reason thereof, the claim herein sued upon is void, illegal and unenforceable, and plaintiff cannot, therefore, recover in this case. Interstate Commerce Act, Act of Congress, February 4, 1887 (24 Stat. L. 379), as amended by Act of March 4, 1889 (25 Stat. L. 855), and Elkins Act, Act of February 14, 1903 (32 Stat. L. 847), and Hepburn Act, Act of June 29, 1906 (34 Stat. L. 584); *United States v. Union Stock Yards*, 226 U. S. 286; *Fourche River Lbr. Co. v. Bryant Lbr. Co.*, 230 U. S. 316; *Railroad v. Goodridge*, 149 U. S. 680; *Railroad v. Interstate Commerce Comm.*, 200 U. S. 361; *White v. United States*, 167 U. S. 512; *Packing Co. v. United States*, 209 U. S. 56; *Railroad v. United States*, 212 U. S. 481; *Railroad v. United States*, 212 U. S. 500; *Railroad v. Commission Co.*, 223 U. S. 573; *Int. Com. Com. v. Railroad*, 225 U. S. 326; *Railroad v. Lumber Co.*, 174 Fed. 107; *Railroad v. United States*, 162 Fed. 835. (2) Since the passage of the Interstate Commerce Act, Congress has taken complete charge of the fixing of rates and the other terms upon which persons and property may be transported in interstate commerce. It has also fixed penalties for the violation of the Interstate Commerce Act and its amendments. The construction to be given these acts is determined by the United States Supreme Court and other Federal Courts, and such decisions are binding upon all State tribunals. *Donovan v. Wells Fargo*, 265 Mo. 291; *Haseltine v. Bank*, 155 Mo. 74; *Briggs v. Holmstrong*, 72 Mo. 337; *Asphalt Co. v. French*, 158 Mo. 539; *Railway v. Stone Co.*, 154 S. W. 465.

Halbert H. McClure and *Ellison A. Neel* for respondent; *Hadley, Cooper, Neel & Wilson* of counsel.

(1) It is not disputed by plaintiff that a contract to receive a rebate or payment back of part of freight charges collected from it is unlawful under the Interstate Commerce Act, but it is contended by respondent in this case that the contract in question is no such con-

Lumber Co. v. Railroad.

tract. (2) It is the duty of the court to leave the construction of an oral contract to the determination of the jury under appropriate instructions and where the evidence as to the intention of the parties is conflicting, it is a question for the jury. *Lime Co. v. Roofing Co.*, 77 Mo. App. 26; *Soap Works v. Sayers*, 55 Mo. App. 16; *Railroad v. Griffin*, 126 Fed. 364; *Durham v. Hastings P. Co.*, 67 N. Y. 632; *Terra Cotta Co. v. Supply Co.*, 18 Fed. 332. (3) Where there is any conflict of evidence as to the intention of the parties to a contract, the court cannot declare the contract illegal as a matter of law. *Railroad v. Griffin*, 126 Fed. 364. (4) There is no law or statute prohibiting a railroad company from making a contract with any other corporation or party to pay a consideration in return for value received by the railroad company, even though the other party may be a shipper over the railroad, unless it be a subterfuge to pay a rebate. *Lumber Co. v. Spencer*, 86 Fed. 846; *Rothschild v. Railroad*, 15 Mo. App. 242; *United States v. Milwaukee R. & T. Co.*, 145 Fed. 1007; *Shanberg v. Railroad*, 3 I. C. C. 502; *Smith v. Railroad*, 1 I. C. C. 611; *United States v. Railroad*, 152 Fed. 269; *Interstate Commerce Comm. v. Railroad*, 128 Fed 59; *Batsell v. Railroad*, 23 S. W. 552; *Railroad v. Ft. Scott*, 15 Kan. 435. (5) The mere fact that the freight rate was referred to in arriving at an amount to be paid by the railroad company to the lumber company for the building of the mill does not imprint the money to be paid the lumber company as a part of the freight rate money. *DeWinter v. Thomas*, 27 L. R. A. (N. S.) 634. (6) The contract in question was no contract with reference to railroad rates at all, but was a plain, simple contract to pay the lumber company a certain amount of money, in consideration of its locating the lumber mills adjacent to its right-of-way, which resulted in the building of a town along its right-of-way and the increasing of the business of the railroad company, and the fact that the freight upon the machinery to build the mill was referred to in arriving at the amount of money to be paid by the railroad to the lumber company, in no way invalidated said contract. Authorities as under point 4. (7) Even

Lumber Co. v. Railroad.

under appellant's theory of this case, the contract would not be unenforceable, as the rate must be both established, filed, posted and published to be a valid rate, and it nowhere appears that the rates in question were ever filed with the Commerce Commission, or posted. U. S. Compiled Statutes, 1910, Supp. 1909, p. 1138 (Interstate Commerce Act); *Armour v. United States*, 153 Fed. 1; *United State v. Wood*, 145 Fed. 409; *Railroad v. Sloop*, 200 Mo. 214; *Griffin v. Railroad*, 115 Mo. App. 554.

WHITE, C.—The suit is for damages for breach of contract.

The plaintiff obtained judgment in the circuit court of Jackson County for the sum of \$4572.54, and after an appeal to the Kansas City Court of Appeals the cause was transferred to this court on motion of the appellants on the ground that the construction of the Fourteenth Amendment to the Constitution of the United States and of section 30, article 2, of the Constitution of Missouri, was involved.

Plaintiff was a corporation engaged in the manufacture and sale of lumber, with headquarters at Houston, in the State of Texas. The petition, filed March 24, 1910, alleges that in the middle of the year 1905 the plaintiff desired to erect large mills for the manufacture of lumber at Clinesburg, in the State of Texas; that the defendants desired to have such mills erected so they "might obtain freight from the hauling of the lumber" so manufactured; the defendants in order to induce the plaintiffs to erect the mills at that time agreed with the plaintiff: "In consideration of the plaintiff erecting said mills at said place that they would pay to the plaintiff an amount equal to one-half of the defendants' proportion of all freight charges for the hauling of all the necessary machinery, material and equipment for the erection and installation of the said mills." That "in consideration of the above" the plaintiff agreed to erect and did erect said mills.

The petition then sets out in detail the machinery and material shipped from various points in other states to Clinesburg, Texas, for that purpose, over the defendants'

lines and other railroads, and the amount of freight charges paid to the defendants, one-half of which amount so received by the defendants was \$4572.54. It then alleges demand of payment and refusal by defendants to pay; wherefore, plaintiff claimed damages in the sum of \$4572.54.

After a general denial, the answer alleges that the contract sued on, if such there were, was illegal, void and unenforceable, and in violation of the Interstate Commerce Act.

The defendants objected to the introduction of any evidence on the ground that the petition failed to state a cause of action, demurred to the evidence at the close of plaintiff's evidence and again at the close of all the evidence; all of which objections and demurrers were overruled, and the cause was submitted to the jury.

There is little or no dispute as to the facts in the case. An agreed statement was introduced which covered all the formal requirements in making out the case as plaintiff conceived it, including the erection of lumber mills at Clinesburg; the interstate character of the shipments over the railways of the defendants of the materials and machinery that went into its construction; the amount of freight charges received by the defendants for such transportation, one-half of which was \$4572.54. The stipulation then provides: "That during the entire time mentioned in the petition to this suit, said freight rates charged and paid by the plaintiff were the regular published tariff rates on said commodities, and that no new tariff, reducing the amount of the rate of said freight charges, was published during said time."

The Foster Lumber Company at the time had its headquarters at Houston, Texas, and owned large tracts of lumber lands located in San Jacinto County, Montgomery County, Harris County and Liberty County, the total amounting to over one hundred thousand acres. The plaintiff desired to erect mills at Clinesburg, which was situated on the line of defendants' railroad, in Montgomery County, within convenient distance of the several tracts. Before beginning the erection of the mills Mr.

Lumber Co. v. Railroad.

Womack, assistant manager, and Mr. Foster, vice-president, of plaintiff, had two or three conversations with Mr. Hershey, general freight agent, and Mr. Coleman, industrial agent, representing the defendants. The plaintiff's representatives wanted to know what the defendants "could do for us in the way of concession or donation;" and put forward the advantages which the plan would be to the road. It would cost approximately five hundred thousand dollars, a town of probably fifteen hundred people would grow up at the point where it would be erected and the defendants would be furnished about a hundred and twenty-five carloads of lumber per month for transportation. Defendants' representatives then suggested that they would give, in consideration of the erection of the mills, an amount equal to half of the freight charges received by defendants on shipments of material that went into the construction of the plant. A telephone conversation finally concluded the agreement on those terms. The only difference between the testimony of plaintiff's witnesses as to what was said at these conversations and that of Mr. Hershey for the defendants, was in the use of terms, the plaintiff's representatives saying they were to receive a "donation" for erecting the mills and Mr. Hershey speaks of it as "reduced rates" for shipping the material used in erecting them. Mr. Hershey stated that his company wanted to get the mills on their roadway "to make business for our railroad," for they would "get to haul that lumber out;" also, the location of a plant of that magnitude would make something of a town and the company would profit by the freight and passenger traffic which would ensue.

After the mills were erected the defendants neglected to pay according to agreement, and the plaintiff began to write letters urging the payment. The word donation was not used in any of these letters. Such expressions as these: "refund that is due us;" "a refund of overcharge on certain shipments;" "our claim for overcharge on machinery," were used.

Mr. Hershey, it appears, desired to pay the claim and took up the matter with the home office in Chicago, but

was notified that it could not be paid, because the Hepburn amendment had become effective, making it unlawful to pay it.

The court instructed the jury that if the defendants agreed with the plaintiff "in consideration of plaintiff erecting said mills at said place" defendants would pay to plaintiff an amount equal to one-half of defendants' proportion of freight charges for handling all necessary machinery, etc., for the erection of said mills, and if plaintiff did erect said mills, etc., the jury would find for the plaintiff in the sum sued for. On behalf of the defendants the court instructed the jury if they found from the evidence that a contract or arrangement was made by the plaintiff and defendants to the effect that the plaintiff was to have "refunded or paid back to it one-half the amount the defendants collected in accordance with the tariffs and schedules filed and published as required by the Interstate Commerce Act," then plaintiff could not recover. The verdict was for the plaintiff in the amount above mentioned.

I. The liability of a carrier upon contracts concerning interstate shipments is governed entirely by the Interstate Commerce Act, and amendments thereto. The construction of that Act by the Federal courts is conclusive upon the State courts. [Donovan v. Wells Fargo, 265 Mo. 291; Haseltine v. Central National Bank, 155 Mo. 1. c. 74; Barber Asphalt Pav. Co. v. French, 158 Mo. 534; American Silver Mfg. Co. v. Wabash R. R. Co., 174 Mo. App. 184; Hardwick v. Wabash R. R. Co., 181 Mo. App. 156.]

Bonus or
Refund on
Interstate
Shipments for
Increased
Business.

The second section of the Interstate Commerce Act provides that it shall be unlawful "if any common carrier subject to the provisions of this act, shall, *directly or indirectly, by any special rate, rebate, draw-back or other device*, charge, demand, collect or receive from any person or persons, *a greater or less compensation* for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of

Lumber Co. v. Railroad.

this act, than it charges, demands, collects or receives *from any other person or persons* for doing for him or them a like and contemporaneous service."

The third section makes it unlawful: "For any common carrier subject to the provisions of this act to make or *give any undue or unreasonable preference* or advantage to any particular person, company, firm, corporation or *locality* or *any particular description of traffic, in any respect* whatsoever, or to subject any particular *person, company, firm, corporation or locality*, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Section six of the act provides for the filing with the Interstate Commerce Commission and publishing a schedule of rates which the carrier may establish, and makes it unlawful for such carrier to charge or collect from any person a greater or a less compensation than that specified in the published schedule. This section was amended in 1903 by the Elkins Act so as to make it unlawful for any person to grant, solicit or accept "*any rebate, concession or discrimination*" in respect to the transportation of property, whereby such property "shall, by any device whatever, be transported at a less rate than that named in the tariffs published." This section was further amended by the Hepburn Act in 1906, after the contract under consideration was entered into, making the provisions a little more specific and making it unlawful for such carrier to "refund or remit in any manner or by any device any portion of the rates, fares and charges specified" in the tariffs filed.

It is claimed by the appellants that the Hepburn amendment applies to the transaction under consideration the same as do the provisions of the act already in force. It is unnecessary, for the purposes of this case, to examine the reason for that position or to determine that question.

The jury by their verdict under the instruction found that the *consideration* for the agreement on which the payment was demanded was the erection of the mills at Clinesburg by plaintiff and found the contract between the parties was *not* "to have refunded or paid back to

plaintiff" one-half of the freight charges defendants collected. It is claimed by the respondent that here is a finding of fact by the jury which fixes the character of the contract as one that is not in contravention of the act. It was an agreement to pay a certain bonus as a consideration for the promotion of industries along the company's line, and the freight rates were simply referred to as a basis for estimating the amount of the bonus.

Putting aside for the moment the question whether the jury were not left to perform the court's function and construe the contract, about the terms of which there is no dispute, what was the effect of their finding? So far as they ascertained a fact and stated the result by the verdict it was nothing more nor less than an ascertainment of the *intention* of the parties to the contract; that is to say, they found that neither the plaintiff nor the defendants intended to violate the law; that they intended to frame their contract in such a way as to make it legal. The stated consideration for the agreement, the building of the mills, is only the surface statement of the matter. The real consideration, the inducement back of that, is made clear by the talk which led up to the arrangement. The railway companies would receive a great deal of future business in the way of handling the freight which came from the mill. If the companies, without violating the act, could give a bonus determined in amount by the freight handled in hauling materials for building the mills, with equal propriety they could give a bonus figured on the freight they would carry in hauling lumber from the mills after they were built, either for a limited time or an unlimited time; and in that case they could have provided for the payment of the bonus in installments at regular intervals based on the freight hauled up to the time of each payment. Any such arrangement would have been the same in purpose and effect as the arrangement sworn to. The consideration, measured by half the amount paid for freight hauled for certain purposes, was to get more freight to haul for other purposes, which meant an average reduction in charge for all freight hauled below the

tariffs charged the general trade. The application of confusing nomenclature and resort to an unusual method of payment do not alter the character of this concession. It would make no sort of difference in the purpose of the parties whether the bonus was paid by the railroad companies in a lump sum after the freight had been hauled and the charges paid, or whether it was simply paid by reduction of the freight bills to half charge in the first place.

It is difficult to frame a law in such form as to anticipate every clever artifice to avoid it; so, according to recognized rules of interpretation, a law of this character must be understood and enforced according to its evident purpose and in the light of conditions which brought it forth. A few cases from the United States Supreme Court show that this act has been so construed as to cover cases similar in effect and similar in shrewdly attempted evasion, to this one. The case of *United States v. Union Stock Yard*, 226 U. S. 286, is a case in point. There the Union Stock Yard Company, which was a common carrier engaged in interstate commerce, made a contract with the Pfaelzers whereby it agreed to pay the latter the sum of \$50,000 in consideration that the Pfaelzers should build a packing plant adjacent the company's yards, costing a certain sum and having a certain capacity. The Pfaelzers agreed that all livestock slaughtered or canned by them within a certain radius should pass through such stock yards and pay the customary tolls and charges and that for fifteen years they would conduct all their slaughtering, packing and canning business at such plant. The only difference between that contract and the contract under consideration, as the latter is interpreted by respondent, is this stipulation to restrict their business to the stock yards company as a carrier for certain purposes. This however, is not a real difference, because while in the Stock Yard case the beneficiary of the bonus was obliged to deal with the Stock Yard Company for a certain time by contract, the plaintiff in the present case was compelled to do so by circumstances. It could not ship over any other road because there was no other road there. The

point decided in the Stock Yard case was that a bonus given to a favored shipper in order to procure his business, is within the inhibition of the Act. The court in that case so construed the act as it was before the Hepburn amendment, and as it stood after the Elkins amendment, which was enacted before the contract under consideration here was entered into. In the case of *Fourche R. R. Co. v. Bryant Lumber Co.*, 230 U. S. 316, where the United States Supreme Court held that a railroad company could not purchase land by rebating to the grantor a part of the freight rate on interstate shipments, it was said, l. c. 323: "The commerce act prohibits the payment of rebates, and its command cannot be evaded by *calling them* differentials or *concessions*, nor by taking the money from the railroad itself or from a company that is proved to be the same as the railroad."

In the case of *New Haven Railroad v. Interstate Com. Comm.*, 200 U. S. 361, l. c. 392, the carrier attempted to conceal a reduced freight rate in the selling price of a commodity which it owned, carried and sold, and the difference was accounted for in the release of an unliquidated claim for damages. The Supreme Court held that it was prohibited by the act. The court used this significant language: "How can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character?"

We may aptly paraphrase the question: how can the defendants in this case take themselves out of the operation of the statute by simply electing to call themselves promoters? The act was not limited in its scope to open violations and discriminations, but was intended to cover all the essential cases where free competition is abridged.

II. But it is said there were other inducements.

Bonus to Favored Shipper.	A town would be built there and a community would grow in commercial importance with consequent demands for freight and passenger transportation, which meant prosperity for the railroad company.
--	--

The promotion of such enterprises has been held to be beyond the legitimate power of a common carrier. [Union

Pacific Railway v. Goodridge, 149 U. S. 680, l. c. 690.] Besides, the purpose of the act was not merely to compel honest competition among railroads engaged in interstate commerce, but to prevent unjust discrimination among *shippers*, to prevent one customer from obtaining in freight rates on interstate shipments an undue advantage of another customer; to promote, as far as the carriers affected the situation, free competition and equality of opportunities among the shippers engaged in maintaining industries which have need of the carrier's lines. Congress in passing the act doubtless had in mind the many instances within the common knowledge where large dealers, by reason of rebates and draw-backs and the advantages derived from them, were enabled to crush out smaller competitors who had no such advantage. The court in the Union Stock Yard case cited above (226 U. S. l. c. 307) stated the purpose thus: "This court has had frequent occasion to comment upon the purpose of Congress in the passage of these laws to require *equal treatment of all shippers* and to prohibit *unjust discrimination* in favor of any of them."

The same court said in the case of Wight v. United States, 167 U. S. l. c. 517: "The wrong prohibited by the section" (Section two of the Interstate Commerce Act) "is a *discrimination between shippers*. It was designed to compel every carrier to give *equal rights to all shippers* over its own road and to forbid it by any device to enforce higher charges against one than another." In the case of Int. Com. Comm. v. B. & O. R. R. Co., 225 U. S. l. c. 342, that court thus declares the purpose of section two of the act: "It must be kept in mind that it is not the relation of one railroad to another with which we have any concern, but *the relation of a railroad to its patrons, who are entitled to equality of charges*." In Int. Com. Comm. v. Delaware, L. & W. R. R. Co., 220 U. S. 235, that court, referring to a previous case, said: It was there held "that a carrier could not properly look beyond goods tendered to it for transportation [in carload lots] 'to the ownership of the shipment' as the basis for determining the application of its established rates."

The public character of the service rendered by common carriers and their obligations to serve the public with indiscriminate justice has been long recognized by the courts, but, in late years, the increasing dependence of the general community upon them for the orderly dispatch of every-day affairs and the maintenance of normal conditions of prosperity, has led to a more intense realization of their purpose by the public and more emphatic pronouncement of their duties by the courts. The act under consideration is a legislative effort to furnish an instrument by which the proper exercise of their functions as public servants may be secured. According to the facts shown here, the plaintiff already had a large advantage over any other possible competitor in owning over one hundred thousand acres of land in the vicinity. By receiving reduced rates, or a bonus if the term is preferred, which would aid it in the construction of a big mill, it would necessarily have an additional advantage over any competitor, big or little, who also desired to erect a mill. It was other lumber manufacturers, actual or prospective, who were discriminated against. The small mill owner, the man of little capital, had a right to the same treatment at that point on interstate shipments as the large mill owner who obtained this advantage.

It was expected that a town would be built along the company's lines where no town had existed before. It is because of unequal opportunities in older communities that men flock to a new and growing community in order that they may have something like an equal show with the others; but a lumber manufacturer coming into this new community with that expectation, would find already that, because the common carrier, the most potent agency in the development of such new country, had granted such special advantages to a powerful competitor, an equal chance was impossible. If the company could favor a lumber dealer it could favor other dealers. It is the creation of such special privileges and such restricting of opportunities to favored persons at the start that prevent the natural and symmetrical development of such a community.

Lumber Co. v. Railroad.

As suggested before, this was an agreement about the terms of which the parties have scarcely any dispute, but it was evident they understood it should not be reduced to writing or put in any form where it might be accessible to court orders. It is not intended by this to say that the parties were guilty of any fraud in an attempt to evade the provisions of the law, because that is not necessary. The act is not limited to fraudulent schemes and devices by which freight rates are reduced or rebates received, but covers every case where there is discrimination. [Armour Packing Co. v. United States, 209 U. S. 1. c. 71.] The real purpose in concealing a discrimination is not always to evade the law, but to hide from other shippers the fact that they were being discriminated against. Doubtless it was to prevent other possible shippers from knowing that the plaintiff in this case had special favors that this was a "gentlemen's agreement" rather than a written contract.

Under the construction of the Interstate Commerce Act and its evident purpose as interpreted by the Supreme Court of the United States, a bonus to a favored shipper is a device condemned by this act. The contract here was within its provisions and void.

III. Appellant asserts there could be no rebate in this case, because, it says, there was no evidence that the rate which the respondent paid was the "legally *established* and published rate."

Evidence of
Established
Rates.

Section six of the act requires that every carrier subject to the provisions of the act "shall file with the Commission created by this act and print and keep open to public inspection, schedules showing all the rates," etc.

The stipulation in the agreed statement of facts before set out says that the rates charged and paid by the plaintiff were the "*regular, published tariff rates.*" By signing the stipulation and offering it all in evidence plaintiff must be presumed to have offered it for a purpose for which it was competent. The evident purpose of that paragraph was to show that the law had been com-

plied with regarding establishing and posting rates and it was not competent for any other purpose; if it was not competent for that purpose plaintiff should not have offered it. Besides, plaintiff proved it paid the "regular full tariff rates," as it apparently felt it had to do in order to make out a case. The fact that the defendant charged those rates as "regular," and plaintiff paid them, is sufficient to show they were the "established" rates. In the case of *Ward v. Mo. Pac. Ry. Co.*, 158 Mo. 226, the plaintiff sued to recover for the loss of household goods shipped. The defendant railroad company answered setting up the contract of shipment which provided that "in consideration of the rate of tariff which is less than the regular rate," the valuation of the goods should not exceed five dollars per hundred pounds, and therefore the loss was much less than plaintiff claimed. This court held that the answer set up no defense because the contract was void, that the designation of the rate as "less than the regular rate" showed it was in violation of the act.

The cases cited by respondent showing it is necessary to prove that the rate was regular, established and published, are where the contest always arose over the validity of the rate under consideration as determined by section six. This cause of action arises on account of a *discrimination* in violation of sections two and three. If the rate charged and paid was "the regular published tariff rates on said commodities," which means the same rate as the defendant charged other people, then the bonus or rebate was a reduction from that charge. If in fact defendants had violated one section of the act requiring the establishing and posting of the rates, that would not make valid a contract which was in violation of another section of the act prohibiting discrimination in rates. The principal case in this State cited by respondent, *Wabash Ry. Co. v. Sloop*, 200 Mo. 198, is one where the railroad company sought to recover from the shipper a deficiency in the rate paid on account of some mistake in the bill rendered, whereby the shipper had paid less than the regular rate. It was held there was no proof that the company had published the rates and hence the ship-

State ex rel. v. Ellison.

per was not bound by them, since he had no knowledge of them and there was nothing to give him notice. The case is not in point, for here the plaintiff seeks to recover one-half of the regular rate he has already paid according to bills presented.

The judgment is reversed. *Roy, C.*, concurs.

PER CURIAM:—The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All of the judges concur.

THE STATE ex rel. CENTRAL COAL & COKE COMPANY v. JAMES ELLISON et al., Judges of Kansas City Court of Appeals, and JOSEPH HOLVEY, Sheriff.

In Banc, May 22, 1917.

1. **MINING: Duty as to Safety.** It is the duty of the miner to keep his working place safe; it is the duty of the master to keep the entries (the places generally used by numerous miners) in a condition of reasonable safety.
2. **INSTRUCTIONS: Broader Than Pleading or Evidence.** An instruction cannot be broader than the pleadings, nor broader than the facts proven; it must be within the purview both of the pleadings and the evidence.
3. ———: ———: **Mining: Place of Danger.** Where the miner was working at removing roof supports that had been left when the rooms of the mine were "turned," and his petition is drawn on the theory that at a point in the mile-long entry fifteen to twenty-five feet from his working place his master had permitted a bad roof to remain, and he had gone to that point to eat his dinner, not knowing it was unsafe, and was killed by the falling of the fragile roof, an instruction which permits a recovery if a large slab of rock fell from the roof of "one of the main entries," without limiting the point of injury to the place in the entry at which the petition charges the negligence was, is broader than the pleadings, and a verdict cannot be upheld on the theory that the error was harmless.

State ex rel. v. Ellison.

4. ———: ———: **Harmless Error.** If evidence assuming a broader field than the pleadings is erroneously admitted, instructions based upon such evidence which are broader than the pleadings cannot be held to be harmless. That course would require defendant to meet an issue of which the petition did not give him notice.
5. ———: ———: ———: **Certiorari: Quashing Opinion of Court of Appeals.** The Court of Appeals cannot preclude a review by the Supreme Court of an instruction that is broader than the pleadings by merely saying it is harmless.
6. ———: **Conflicting.** An instruction for plaintiff authorizing a recovery if a loose slab of rock fell from the roof of "one of the main entries of defendant's mine" and crushed the miner, is in direct conflict with a correct instruction given for defendant telling the jury, in the language of the petition, that they must find the roof fell at a point fifteen to twenty feet from his working place; and by repeated decisions it has become the established rule of law in this State that if two instructions conflict and the one given for appellant is right under the law, the giving of the one for plaintiff is error, for which a judgment for him must be reversed.
7. ———: **Damages: Aggravation.** An instruction telling the jury that, if they find for plaintiff in the action for the negligent killing of her husband, they will allow her a sum not to exceed \$10,000, in their discretion, etc., and "you may also take into consideration the facts constituting negligence on the part of the defendant causing the death," was erroneous, first, because there were no aggravating circumstances shown and the instruction was therefore broader than the evidence; and, second, the petition did not plead such a case, and the instruction therefore broadened the issues.

Certiorari.

RECORD QUASHED.

B. R. Dysart and W. C. Goodson for relator.

(1) It is now well settled that the Supreme Court has the power as well as the duty to quash the decision of one of the appellate courts of the State, where its rulings are not in accord with, but against the rulings of the Supreme Court. *State ex rel. v. Ellison*, 266 Mo. 604; *State ex rel. v. Reynolds*, 265 Mo. 88. (2) If the Court of Appeals approves the admission or exclusion of evidence, contrary to prior rulings of the Supreme Court; and if the Court of Appeals approves an in-

State ex rel. v. Ellison.

struction, which instruction was not in accord with the last or prior instruction of the Supreme Court, then the Supreme Court on *certiorari* will quash the record of the Court of Appeals. State ex rel. v. Ellison, 256 Mo. 644. (3) It is submitted by the relator that the Kansas City Court of Appeals failed to follow the last ruling decision of the Supreme Court in the following particulars: (a) The Court of Appeals approved an instruction authorizing a recovery if plaintiff's husband was killed anywhere in the relator's coal mine, provided he was so killed away from his working place; and this in the face of the fact that her petition alleged that he was killed fifteen or twenty-five feet north of his working place, and that he was killed by reason of the fact that the relator had negligently failed and neglected to care for and keep in repair the roof of the entry at a point fifteen or twenty-five feet north of his working place. This instruction was evidently a broadening of the issues, and if so, it contravenes prior rulings of the Supreme Court. Dagonia v. Railroad, 224 Mo. 589; Mansur v. Bott, 80 Mo. 658; Bank v. Murdock, 62 Mo. 70; State ex rel. v. Ellison, 176 S. W. 11; State ex rel. v. Ellison, 181 S. W. 998; State ex rel. v. Ellison, 187 S. W. 23. (b) There was palpable and radical error in Instruction 2 given by the trial court on the measure of damages, which was contrary to the former rulings of the Supreme Court. Said instruction authorized the jury to take into consideration the character of the defendant's negligence. The verdict and judgment of the court was for \$6000. Said instruction sounded in punitive damages. It was equivalent to saying: "You should take into consideration the aggravating circumstances of the defendant's negligence." Boyd v. Railroad, 236 Mo. 54; Goode v. Coal Co., 167 Mo. App. 176. (c) Instruction 7 was evidently correct, and in palpable conflict with the plaintiff's instruction 1, and therefore in conflict with the last and prior rulings of the Supreme Court. Sheperd v. Transit Co., 189 Mo. 373; Porter v. Railroad, 199 Mo. 96; Imp. Co. v. Ritchie, 143 Mo. 612.

Dan R. Hughes and Burns, Burns & Burns for respondents.

(1) Plaintiff's instructions declare the law. *Boyd v. Railroad*, 236 Mo. 94; *Boyd v. Railroad*, 249 Mo. 136; *Goode v. Coal & Coke Co.*, 179 Mo. App. 207; *Goode v. Coal & Coke Co.*, 167 Mo. App. 169. (2) The opinion of the Kansas City Court of Appeals is not in conflict with decisions of the Supreme Court. *Holman v. Macon*, 177 S. W. 1078; *Mansur v. Botts*, 80 Mo. 658; *State ex rel. v. Reynolds*, 265 Mo. 88; *Dagonia v. Railroad*, 224 Mo. 564; *National Newspaper Assn. v. Ellison*, 176 S. W. 11; *State ex rel. v. Robertson*, 262 Mo. 535. (3) Plaintiff's instruction on the measure of damages correctly declares the law. *Boyd v. Railroad*, 236 Mo. 54-94; *Boyd v. Railroad*, 249 Mo. 110-136; Secs. 5426, 5427, R. S. 1909. (4) Where the judgment is for the right party it will not be reversed, although error was committed. Sec. 2082, R. S. 1909; *Putnam v. Bowyer*, 173 Mo. App. 394; *Redd v. Railroad*, 161 Mo. App. 522.

GRAVES, C. J.—*Certiorari* to the Kansas City Court of Appeals, directing that said court certify up its record in the case of Catherine Goode, Respondent, v. Central Coal & Coke Company, Appellant. The case has experienced a rather checkered career. The judgment now certified to us by the Court of Appeals is the third judgment entered therein by that court. When the case was first there (167 Mo. App. 169) a judgment for plaintiff was reversed for errors in instructions. So, too, when there the second time (179 Mo. App. 207) it was likewise reversed for errors in instructions. By the present (third) judgment the plaintiff is sustained in a recovery of \$6000 for the alleged negligent killing of her husband whilst working as a coal miner for defendant in one of its mines in Macon County. The record is somewhat broadened because the opinion before us refers specifically to the two previous opinions for the facts. We have, therefore (by this reference in the last opinion) not only the three opinions of the Court of Appeals, but likewise such records and evidence as are

incorporated therein, either by reference or by direct quotation. Under these circumstances it would be indeed singular if the complete record in the Court of Appeals was not before us through their several opinions. From them all we gather the facts thus: Plaintiff's husband was killed in one of defendant's coal mines in Macon County, Missouri. She, conceiving that the negligence of the defendant occasioned his death, brought suit for \$10,000 damages. The petition charges (1) that it was the duty of defendant to exercise reasonable care to keep its shafts, entries and drifts in a reasonably safe condition; (2) the petition then proceeds in this manner:

"Plaintiff further states that said Mine No. Sixty-One is a large mine, at which defendant employs a large number of men; that on the said 27th day of March, 1911, the defendant and its officers and agents ordered and directed the said James V. Goode to go through one of the main entries of said Mine No. Sixty-one, known as the third south entry off the sixth west entry, being an entry running north and south in said mine, and at the east side of said entry engage in taking out coal by what is known as pulling pillars; that the said James V. Goode, deceased, did go to said point and did work as so ordered; that the said point, where defendant and its officers and agents so directed James V. Goode to work and where he did work as aforesaid, was a great distance from the shaft or place of entrance to said mine, and for economy of time it was necessary for the deceased, James V. Goode, to take his noon lunch with him into said mine.

"Plaintiff further states that the defendant and its officers and agents carelessly and negligently permitted and suffered the roof of said entry in said mine in which the said James V. Goode was ordered and directed to work and at a point from fifteen to twenty-five feet north of the working place of said James V. Goode, on said March 27, 1911, to be and remain dangerous and unsafe and then and for some time prior thereto carelessly and negligently failed and neglected to

prop, brace or otherwise support or protect the roof of said entry at a point from fifteen to twenty-five feet north of the working place of the said deceased James V. Goode and at a place in said entry where it was the duty of the defendant to use reasonable care to keep the same in a reasonably safe condition. The roof of said main entry was composed of fragile and breakable rock, slate and dirt, and was on March 27, 1911, and for some time prior thereto had been loose, unsafe and dangerous; all of which the defendant and its officers and agents well knew, or by the exercise of ordinary care could have known.

"Plaintiff further states that on the 27th day of March, 1911, at about twelve o'clock, noon, the deceased, James V. Goode while engaged as a coal miner as aforesaid and while in the exercise of due care and caution and without fault or want of care on his part 'stepped from the point' at his working place about the east side of said main entry to a point from fifteen to twenty-five feet north of his working place in said main entry in said Mine No. Sixty-one, where it was the duty of the defendant to use reasonable care and diligence to keep the roof thereof in a reasonable safe condition, for the purpose of eating his lunch, and while so engaged, a large slab of rock fell from the east side of the roof of said main entry westward down to and upon the deceased, James V. Goode, thereby crushing, mangling, injuring and cutting off the top of his head, from which crushing, mangling and injuring the said James V. Goode then and there instantly died.

"Plaintiff further states that the death of the said James V. Goode was caused, occasioned and brought about by reason of the carelessness and negligence of the defendant and its officers and agents in so carelessly and negligently failing and neglecting to use reasonable care and diligence to make the roof of said main entry in said Mine No. Sixty-one reasonably safe at and about the point where the deceased, James V. Goode, was killed as aforesaid, when the defendant through its officers and agents knew, or by the exercise of ordinary

care and diligence, could have known that the roof of said main entry at said point and away from the working place of the said deceased, James V. Goode, was ordered to work was dangerous and unsafe as aforesaid."

The answer consisted of (1) a general denial; (2) plea of contributory negligence; and (3) a plea of assumption of risk. The petition for *certiorari* charges several conflicts between the opinion of the Court of Appeals and opinions of this court, which, in connection with this general outline, will be noted in the course of the opinion.

I. It is clear that the petition charges that the place of plaintiff's husband's injury was in an entry way fifteen to twenty-five feet north of the place where the plaintiff was working. Plaintiff's husband was engaged in a work somewhat different to ordinary mining. In other words, he was not working in a room "drifted" out from an entry, but was in fact depleting a mine. His business was to remove the roof supports, or pillars of coal, that had been left when the rooms of the mine were "turned." His petition so shows and the recited facts in the opinions so show. According to his petition he was directed to remove these "pillars" of coal and thus close that portion of the mine from further mining operation. Under the well established mining law of the State, it is the duty of the miner to keep his working place safe, and the duty of the master to keep the entries (the places generally used by many miners) in a condition of reasonable safety. The petition in this case is on the theory that the plaintiff was placed to work at a given place and that at a point (in an entry) fifteen to twenty-five feet north of his working place (a place where he had to look after his own safety) the master had negligently and knowingly permitted a bad roof to remain. The petition does not charge that the roof of this entry was dangerous at any other place, although it is shown that the working place and necessarily this entry was about a mile from the shaft, or place of exit. Presumably from the facts in-

licated the entry was one of some length, and not only so but there were others in the immediate community. Under these facts and this kind of a petition, the trial court instructed thus:

“The Court instructs the jury that if you believe and find from the evidence that the defendant was on the 27th day of March, 1911, a coal mining corporation, operating a coal mine known as Mine Number 61, near Ardmore, Macon County, Missouri; that James V. Goode was in the employ of the defendant, engaged as a common laborer in digging coal for defendant; that prior to and on the 27th day of March, 1911, James V. Goode was the husband of plaintiff, Catherine Goode, and that on said 27th day of March, 1911, said James V. Goode was working for the defendant in its said Mine Number 61, and was in the exercise of reasonable care and caution for his own safety on his part; and that a large slab of rock fell from the side and roof of *one of the main entries of defendant's said mine* and at a point away from his working place, on to the said James V. Goode and instantly killed him; that said slab of rock was and had been loose and dangerous, and that the defendant, its officers and agents knew, or by the exercise of ordinary care would have known that said slab of rock was loose and dangerous, and that said James V. Goode did not know, and by the exercise of ordinary care would not have known that said slab of rock was loose and dangerous, then your verdict must be for plaintiff, in such sum as you may believe from the evidence she is entitled to recover, if any, not to exceed the sum of ten thousand dollars.”

The italics, supra, are ours. It should be noted that the instruction in so far as it undertakes to locate the place in the mine whereat the defendant had been negligent, says: “from the side and roof of one of the main entries of defendant's said mine,” without limiting it to the place in the entry where the petition of the plaintiff charged the negligence to be. Nor does it limit it to the entry wherein the deceased was at work. It simply describes the place “as one of the main en-

tries.” Defendant contends that this instruction broadened the issues made by the pleadings, and that the Court of Appeals in upholding a judgment growing out of such an instruction had gone contra to our rulings. The Court of Appeals in the opinions filed do not seriously question that the instruction broadened the issues, but rather sustain the verdict upon the theory that the error was harmless. Error is presumed to be harmful unless the contrary be made to appear. Under this petition the defendant had the right to conclude that there was no necessity of disproving negligence in the maintenance of the entry roof at any point except that named in the petition. The failure to charge negligent maintenance at any other point amounted to a concession that at other points the entry roof was safe. At least it was not incumbent upon defendant to prepare proof as to safe maintenance except at the place named. To require the defendant to defend against alleged negligence at other points in the entry or in the mine would be manifestly unfair. Under the petition the defendant might be fully prepared to meet this issue of alleged negligence, but would not be prepared if the plaintiff’s proof was permitted to take a broader range and show negligence elsewhere than alleged in the petition. But even if the proof does take a broader range, yet an instruction given must be both within the terms of the pleadings and the proof. We have had occasion to examine this rule several times, and tried to shortly express the Missouri case law when in *Degonia v. Railroad*, 224 Mo. l. c. 589, we said:

“But, further, an instruction cannot be broader than the pleadings, although the evidence may take a wider range, nor on the other hand can the instruction be broader than the facts proven, although the pleadings may take a broader range. In other words, the instruction must be within the purview both of the pleadings and the evidence. [Mansur v. Botts, 80 Mo. l. c. 658; *Bank v. Murdock*, 62 Mo. 70.]”

The Missouri case law upon the subject of broadening the issues made by the pleadings by way of instruc-

tions (even though based upon evidence beyond the scope of the pleadings) are fully reviewed in the later case of *State ex rel. National Newspapers' Assn. v. Ellison et al.*, 176 S. W. 1. c. 13, whereat we said:

“Having so pitched his battle lines, the legal battle must proceed upon such lines. He cannot broaden the issues either by evidence or instruction.”

We were there discussing the negligence pleaded in the petition, and so discussing it in a case where the evidence offered took a broad latitude. We announce again, as we have before, that instructions cannot be broader than the pleadings, however much latitude the course of the evidence may take. The issues to be covered are the issues (in the first instance) made by the pleadings. No instructions should be broader, as to issues, than the pleadings. If the evidence is not as broad and comprehensive as the issues made by the pleadings, then the instructions must be within the evidence and the pleadings, but cannot be broader than the evidence.

In the instant case the evidence assumed a broader field than the pleadings. In such event the instructions must be limited to the issues raised by the pleadings. The instruction cannot follow the broad latitude of the evidence, and especially so when such evidence was objected to at the trial. But we need not rely upon an objection to irrelevant evidence. At most, the issues made by the pleadings are the only ones to be instructed upon, and even these issues may be lessened in number if the evidence offered does not cover all the issues made by the pleadings. In the instant case the instruction did go beyond and broaden the issues made by plaintiff's petition, and in this violated the rule announced by this court, and the opinion of the Court of Appeals likewise contravened our rule when it sustains the instruction. The opinion practically admits this position, but takes the view that the error was harmless. We cannot take that view of the instruction. When a trial court admits evidence (erroneously) beyond the issues made by the pleadings, and then in-

structs (erroneously) upon such evidence, it is requiring the defendant to meet an issue of which it had no notice by the service of process and the petition. The defendant is entitled to know from the petition just what he is called upon to defend, and we can't say that it is harmless when he is called upon to defend (without notice) a different negligent act. Nor can the Court of Appeals by merely saying that the erroneous instruction is harmless preclude our review of it here in a case of this character. For the reasons aforesaid the record of the Court of Appeals should be quashed. Other questions we take next.

II. As stated before, we have three opinions to which to go for the facts. It is next urged here that the broad instruction discussed in the previous paragraph of this opinion is in direct conflict with Instruction 7 given for defendant. Instruction 7 reads:

"You are further instructed by the court that the negligence charged in plaintiff's petition is that plaintiff's husband sat down to eat his dinner at a point fifteen or twenty feet north of his working place, at which place there was an overhanging, unsafe and dangerous rock, which was known to the defendant, or could have been known by the exercise of ordinary care; now, you are instructed that it devolves upon the plaintiff to prove the said facts alleged, by a preponderance of the evidence, that is to say, by the greater weight of evidence; otherwise she cannot recover, and your verdict must be for the defendant."

That there is a conflict is apparent. The one confines plaintiff's proof of negligence to the place alleged in the petition, whilst the other is at least a roving commission to find negligence in the maintenance of the roof of entry at any point in such entry. As said previously, such a roving commission is unfair to one called upon to disprove negligence. Where the petition charges the particular place whereat the negligence exists, it is wrong and unfair to require the defendant to defend against alleged negligence in another place.

Such defendant might announce ready for trial upon the negligence charged in the petition, and yet be wholly unprepared to meet evidence of negligence at another place. The law contemplates a fair fight in an open field, but that field is the one circumscribed by the pleadings. The opinion last delivered by the Court of Appeals in effect overrules the contention of the defendant that there is a conflict in these two instructions. That there is a conflict is apparent; and if the instruction for defendant was correct, as we have indicated by our discussion under point one, *supra*, then the Court of Appeals has contravened innumerable decisions of this Court in permitting a verdict thus procured to stand. We have always ruled that if two instructions conflict, and the one given for appellant is right under the law, then the giving of the one for the respondent was error for which the case should be reversed. Such is the status of this case.

In *Mansur-Tebbetts Imp. Co. v. Ritchie*, 143 Mo. l. c. 613, we said:

"Irreconcilable and contradictory instructions are necessarily confusing to the jury, and invariably breed error. It cannot be said this is harmless error. We are not able to say which instruction the jury followed and which it disregarded."

III. Upon the measure of damages the plaintiff's instruction reads:

"The court instructs the jury that if you find for the plaintiff you shall allow her a sum not to exceed ten thousand dollars, in the discretion of the jury, and in determining the amount you will allow her you may take into consideration the pecuniary loss, if any, occasioned to the plaintiff by the death of her husband, *and you may also take into consideration the facts constituting negligence on the part of the defendant causing the death*; and in considering the subject of her pecuniary loss you may consider what would have been the value of her support from her husband from the time of his death during the time he would probably have lived and

State ex rel. v. Ellison.

supported her, and you may also consider the additional burden, if any, falls upon her, for the support of her minor children by reason of his death."

This instruction is referred to and quoted from in the opinion. We have italicized the clause criticized by the appellant. It is urged that this clause permitted the jury to add to the damages by way of punishment to the defendant. Appellant says that such instruction sounded in punitive damages.

The statute, Revised Statutes 1909, section 5427, reads:

"Damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in section 5425; and in every such action the jury may give such damages, not exceeding ten thousand dollars, as they may deem fair and just, with reference to the necessary injury resulting from such death, to the surviving parties who may be entitled to sue, *and also having regard to the mitigating and aggravating circumstances attending such wrongful act, neglect or default.* [R. S. 1899, sec. 2866, amended Laws 1907, p. 252.]" The italics are ours.

It must be remembered that this statute is fixing the liability not only in simple cases of negligence but in cases of wilful wrongful acts. These sections 5426 and 5427, Revised Statutes 1909, furnish the basis for wilful wrongs such as unjustifiable assaults. [Gray v. McDonald, 104 Mo. 303.] The clause in this instruction directing the jury to specifically consider the facts constituting the negligence sounds much like authorizing the jury to aggravate the damages if the evidence of negligence would justify. The instruction with this phrase in it was error for two reasons: (1) there were no aggravating circumstances shown, and, therefore, the instruction was broader than the evidence; and (2) the petition did not plead such a case. So that this, like the first instruction discussed in paragraph one hereof, broadened the issues, and the court violated our rule as expressed in the cases cited, supra, in holding

State ex rel. v. Hackman.

that such was a proper instruction. Other points made need not be discussed. From what is said the record of the Court of Appeals should be quashed, and it is so ordered.

All concur, except *Bond, J.*, who dissents, and *Williams, J.*, who did not sit.

THE STATE ex rel. CLAY COUNTY v. GEORGE E.
HACKMAN, State Auditor.

In Banc, May 22, 1917.

1. **PUBLIC ROAD BONDS: Maximum County Indebtedness: Five Per Cent Limit: Legislative Exercise.** A county may incur an indebtedness in excess of five per cent of its assessed taxable wealth for the purpose of improving public roads in the county. By the amendment to the Constitution adopted in 1906 the theretofore existing maximum limit of five per cent upon the amount of county bonded indebtedness for road purposes, was removed; and Sec. 10520, R. S. 1909, enacted in 1907, Laws 1907, p. 411, authorized the exercise by the county of the constitutional power conferred by that amendment.
2. ———: **Court Order: What Are Public Roads.** The order of the county court containing a recital that the proceeds of the bond issue shall "be used for the improvement of the public roads of the county" is an essential prerequisite to a valid election under the Act of 1907; but the words "of the county," when compared with the rest of the act and the constitutional amendment of 1906, mean the public roads "in the county;" and since the word "road" is a generic term and includes highways and even streets, the proceeds of the bond sales may be used to improve public roads within unincorporated villages and towns which are connecting links between roads lying outside their limits, and also the roads lying within existing special road districts, and the court order may so declare. *Held*, by WALKER, J., dissenting, with whom FARIS, J., concurs, that a public road means a highway outside the corporate limits of a city or town, while a street means a highway within such limits; and when the term "public road" is used in a statute, a strict compliance with which is necessary to authorize the incurring of an added burden of taxation, it cannot be held to include streets within an incorporated city or town unless that purpose is expressed in the statute with particularity.

State ex rel. v. Hackman.

3. ———: **Use on City Streets: A County Use.** Proceeds from an issue of bonds by a county to improve the public roads in the county, under the constitutional amendment of 1906 and the Act of 1907, may be used in improving parts of city or village streets which form a part of the system of the public roads to be improved. The use of the fund for improving portions of the city streets that form connecting links in the connected system of public roads in the county is for a county use or purpose, and not a purely municipal purpose, and is vastly different from turning over a part of the fund to city treasuries to be used in improving streets. [Distinguishing *State ex rel. Kirkwood v. County Court*, 142 Mo. 575, and *Green City v. Martin*, 237 Mo. 1. c 484; and disapproving *obiter dictum* in *State ex rel. St. Louis County v. Gordon*, 268 Mo. 713.]

Held, by WALKER, J., dissenting, with whom FARIS, J., concurs, that the streets of an incorporated city or town are not within the purview of the Acts of 1907.

4. ———: ———: **Control Over Fund.** Whether the authorities of cities or existing special road districts have exclusive control over the streets and public roads within their respective territories, or whether the county court has authority to make the proposed improvements in the streets and roads therein, contemplated by the proposed county bond issue, does not affect the validity of the bonds, and is not for determination in adjudicating their legality.

Held, by WALKER, J., dissenting, with whom FARIS, J., concurs, that in the absence of a statute specifically so providing, the county court has no authority to interfere with the care and maintenance of streets in incorporated towns or to extend aid to the municipality in the improvement of their streets.

Mandamus.

WRIT ISSUED.

Ernest G Simrall, Martin E. Lawson, Ralph Hughes
and *Craven & Moore* for relator.

(1) The amendment of 1906 is simply the removal of a limitation heretofore existing; it is not a grant of power, hence is necessarily self-enforcing, to the extent that it abolishes previous limitations, so that an act of the Legislature giving a county power to issue bonds for road purposes confers that power upon the county without any limitation. *State ex rel. v. Duncan*, 265 Mo. 41; *Arnold v. Hawkins*, 95 Mo. 569; *State ex rel. v. R. R.*, 74 Mo. 163; *St. Joseph Board v. Patton*, 62 Mo. 444; *State ex rel. v. Van Every*, 75 Mo. 530; *Evans v. McFarland*, 186 Mo.

726; Sharp v. Biscuit Co., 179 Mo. 563; McGrew v. Railroad, 230 Mo. 518. (2) The fact that the county court in its order calling the election, and afterward, provided that the proceeds of the bond issue would be expended on certain designated roads does not invalidate the election or make void the bonds. Morse v. Granite County, 119 Pac. (Mont.) 286; Louisville v. Park Commissioners, 112 Ky. 400; Yesler v. Seattle, 1 Wash. St. 308; Grumly v. Marietta, 132 Ga. 408; Santa Barbara v. Davis, 92 Pac. 308; Bell v. Shreveport, 127 La. 691; Swan v. Murray, 146 Ky. 148; Perkins County v. Graff, 114 Fed. 441; Railroad v. Merrick County, 24 Fed. 644; Wilson v. Pike County, 144 Ala. 397; State ex rel. v. Gordon, 217 Mo. 103. (3) Where the county court declared either in the order calling a bond election, or afterwards, that the proceeds of the bonds would be used on certain specified roads, and where such declaration was made in good faith, the bonds voted are valid, even if by reason of a legal impediment every portion of all the roads to be improved cannot be built. Authorities last above. (4) Roads within the limits of special road districts are still "public roads of the county" upon which under Sec. 10522, R. S. 1909, the money derived from this bond issue may be spent and the "exclusive jurisdiction over roads given to these districts by the acts incorporating them is exclusive only for the purposes of their organization and does not and was not intended to preclude the county from improving roads therein under the power of the constitutional amendment and statute." General statutes which have a particular application inside the boundaries of political subdivisions prevail over general terms contained in the acts creating such subdivisions. Board of Education v. St. Louis, 267 Mo. 362; Peterson v. Railroad, 268 Mo. 488.

James S. Simrall, amicus curiae.

Frank W. McAllister, Attorney-General and S. P. Howell, Assistant Attorney-General, for respondent; Theodore Emerson and R. E. Ward, of counsel.

(1) The county court has no authority to use county funds in paving city streets, and an election held for

said purpose was an unlawful election. The contemplated paving, under the order of the county court and the plat locating the roads, as alleged in the return and not denied, includes the paving of certain streets in seven municipal corporations, aggregating about five and one-third miles. State ex rel. v. Gordon, 188 S. W. 160; State ex rel. v. County Court, 142 Mo. 575; Lamar Township v. Lamar, 260 Mo. 182; Sec. 46, Art. 4, Constitution. (2) By express statutory provision, special road districts are invested with "sole, exclusive and entire control and jurisdiction over all public highways, bridges and culverts within the district." The contemplated paving, as alleged in the return and not denied, includes the paving of about 99 miles of public road within the eleven special road districts, over which the county court has no control or authority to expend county funds on such roads. Harris v. Bond Co., 244 Mo. 686; Sec. 10585, R. S. 1909; Laws 1913, p. 680, sec. 10615. (3) The county court ordered an election to authorize the voting of bonds for the purpose of constructing certain designated roads which ran through special road districts and incorporated cities and towns over which the county court has no authority or control and upon which they cannot expend county funds. The voters authorized the issuance of bonds to construct all the roads, as designated in the plat referred to in the petition and notice of election, and did not authorize the issuance of bonds which can be used only upon a certain portion of said designated roads. The county court cannot submit one program to the voters and then carry out a different program. Such course would be equivalent to the county court making a new, separate and distinct contract from that authorized by the people at the polls and one which the court has no means of knowing that they would have authorized. Thornburg v. District, 175 Mo. 31; State ex rel. v. Gordon, 223 Mo. 17. (4) The constitutional amendment to section 12 of article 10, adopted in 1906, provides that "a county may be allowed to become indebted" to a larger amount than the five per cent of the assessed valuation theretofore authorized, but the General Assembly has not, by any legislative

enactment, allowed this to be done. The decided cases announce the rule, that an exception which allows the incurring of a large indebtedness than that authorized by the original constitutional provision is not self-executing but requires further legislative authorization before such exception can become operative. *Brooks v. Schultz*, 178 Mo. 227; *State ex rel. Baird v. Holliway*, 66 Mo. 387; *Public School v. Patton*, 62 Mo. 449; *State ex rel. v. Railroad*, 74 Mo. 163; *Arnold v. Hawkins*, 95 Mo. 569. (5) Secs. 10520-24, R. S. 1909, under which this bond election was held, expressly limit the procedure provided therein to cases where the indebtedness to be contracted falls within the limit of the maximum indebtedness which the county, under the Constitution, may incur, while the election in this case was ordered and held for an amount in excess of said five per cent limit of maximum indebtedness, and was therefore ordered and held without authority of law. (6) Under the authority of Sec. 10618 (*Laws 1913*, p. 682) special road districts are authorized to issue road bonds, and at least one of said districts in Clay County has already issued bonds to the amount of \$77,000 for the purpose of constructing public roads lying wholly within such districts. To permit the levying of an additional tax under the authority of Sec. 10520, R. S. 1909, upon the land lying wholly within such districts and for the purpose of constructing public roads amounts to double taxation and is in violation of the principle of uniformity required by constitutional provision and also results in a denial to the owners of property within such districts of the equal protection of the laws, as provided in section 3, article 10, Missouri Constitution, and section 1 of article 14 of the Constitution of the United States. (7) Since the enactment of Sec. 10594, R. S. 1909, as amended, *Laws 1913*, p. 675, and section 10616, all moneys collected for road purposes on land within special road districts must be turned over to be expended by and under the authority of the commissioners of such districts. The county court therefore has no authority to levy and collect taxes for road purposes on property within such

special road districts and this election therefore is invalid and without authority of law.

WILLIAMS, J.—This is an original proceeding in mandamus brought by the relator to compel the State Auditor to register a portion (\$10,000) of a total \$1,250,000 proposed public-road-bond issue of Clay County. The bonds, representing the sum of ten thousand dollars, were, upon presentation to the State Auditor, refused registration. Thereupon this proceeding was instituted. The issuance of the alternative writ was waived. The pleadings consist of relator's petition, respondent's return thereto, and relator's motion for judgment upon the pleadings. The bonds are attempted to be issued under authority of section 10520 et seq., Revised Statutes 1909.

There is no dispute about the facts, which may be stated substantially as follows:

On May 15, 1916, a petition, duly signed by one hundred taxpaying citizens of Clay County, was presented to the county court of said county asking that a proposition be submitted to the qualified voters thereof to bond said county in the sum of \$1,250,000 for the purpose of grading, constructing and paving the public roads in said county. It also appears that at the time the petition, above mentioned, was presented to the county court the petitioners also submitted to the court a plat of said county showing the location of the roads proposed to be improved, together with an engineer's estimate of the cost thereof. This plat, which by stipulation of the parties, is now before us, as a part of the pleadings, shows a proposed connected system of rock roads designated to serve the needs of the whole county; the total mileage of the proposed roads being 202.3 miles. The plat shows the proposed roads as passing through several of the small incorporated towns and villages in said county, but stopping at the edge of the large cities of said county. About five and one-third miles of the proposed improved roads are thus included within small incorporated towns, and serve as connecting links of the total mileage proposed to be improved. It also appears as an admitted fact

that about ninety-nine miles of said proposed improved roads are within the boundaries of certain designated special road districts of said county, and connect with the other roads to be improved.

On the day that the petition was filed the county court made an order that an election be held within forty-five days, to-wit, on June 24, 1916, for the purpose of submitting said issue to the qualified voters of said county. Said order sets forth that the county court finds that in order to improve said public roads of said county "as located on said plat" it would be necessary to bond the county in the sum of \$1,250,000. The court then sets out in its order a list of the proposed improved roads, the amount of mileage of each proposed road and the estimated cost thereof as shown by the plat and estimate filed by the petitioners with their petition. Said order states the amount of the proposed bonds and that they should bear interest at four and one-half per cent. per annum from the date of issue. Said order contained the further statement: "It is further ordered by the court that the proceeds of the sale of said bonds are to be and shall be used for the improvement of *the said public roads* of said Clay County, Missouri, by grading, constructing and paving same with macadam surface *as petitioned for* and that the proceeds derived from the sale of said bonds *shall be expended on each of the aforesaid roads* in proportion to the estimates on said roads unless such road is graded as planned therein for a smaller amount." (Italics ours).

The order also states that "the debts of said Clay County, Missouri, for said purpose do not equal the maximum indebtedness said county of Clay, under the Constitution, may incur."

Notice of said election was given as required by section 10520, Revised Statutes 1909. Said notice among other things recites that the proceeds of said bonds were to be used "for the purpose of grading, constructing and paving with macadam surface about 202.3 miles of the public roads of Clay County, Missouri, as fully shown by map and estimate now on file in the office of the Clerk of

the county court and as set out in the order of the court above mentioned."

The election was duly held and the vote was taken by proper ballot and the vote was properly tabulated and certified and spread upon the records of said county court, showing that the proposition "for increase of of county indebtedness in the sum of \$1, 250,000" carried by a vote of more than two-thirds of the qualified voters of said county voting at said election. No question is raised concerning the form of the bonds now sought to be registered.

The assessed taxable property of Clay County is admitted to be approximately \$15,000,000.

I. It is contended by respondent that Clay County is without authority of law to incur a bonded indebtedness in excess of five per cent of its assessed taxable property, for the purpose of improving public roads in **Maximum Indebtedness.** said county, and that, therefore, said bond issue of \$1,250,000, which exceeds five per cent of its assessed taxable property (approximating \$15,000,000), is illegal.

We are unable to agree with this contention.

It is true as stated that the proposed issue of bonds does exceed five per cent of the assessed taxable property of said county.

However, at the general election in November, 1906, by vote of the people of the State, section 12 of article 10 of the Missouri Constitution was amended by inserting, after the word "jail" in line 13, the following: "or for the grading, construction, paving or maintaining of paved, gravelled, macadamized or rock roads and necessary bridges and culverts therein."

By this amendment the theretofore existing constitutional five-per-cent limit upon the amount of county bonded indebtedness for road purposes was removed. This much is conceded by respondent but he further contends that the constitutional amendment is not self-enforcing, and that the General Assembly, prior to the calling of the election for this bond issue, had passed no act which

would authorize the exercise by the county of this enlarged power; that Section 10520, Revised Statutes 1909, does not so authorize the county.

Said Section 10520 was enacted in 1907 (Laws 1907, p. 411), the first General Assembly after the adoption of the above constitutional amendment, and is as follows:

"Whenever a petition, signed by one hundred tax-paying citizens of any county in this State, shall be presented to the county court thereof, asking that a proposition be submitted to the qualified voters of the county to bond the county for the purpose of grading, constructing, paving or maintaining paved, graveled, macadamized or rock roads or necessary bridges and culverts in said county, it shall be the duty of said county court to order that an election be held, within forty-five days after making said order, to determine whether or not the bonds of said county shall be issued and sold and the proceeds thereof used for any of such purposes, unless the debts of the county for said purpose already equal the maximum indebtedness said county, under the Constitution, may incur. Said order shall contain the amount of bonds it is proposed to issue, the rate of interest they are to bear, the date of the election, and a recital that the proceeds thereof are to be used for the improvement of the public roads of the county. Notice of such election shall be given by publication in at least two newspapers of the county, said notice to be published once a week in four separate issues of each of said papers prior to said election."

This point, in a somewhat different form, was urged in the recent case of *State ex rel. St. Louis County v. Gordon*, 268 Mo. 713, 188 S. W. 160; but the court properly held that the point was not there presented because (among other reasons) the proposed issue of bonds in that case did not exceed the five per cent of the assessed taxable wealth of St. Louis County. But here the point is involved, for the reason that, as above stated, the proposed issue exceeds five per cent of the assessed taxable wealth of Clay County.

Respondent contends that the phrase "unless the debts of the county for said purpose already equal the

maximum indebtedness said county, under the Constitution, may incur," used in Section 10520, *supra*, means that the county may become indebted for road purposes to the five-per-cent limit of other indebtedness mentioned in the Constitution, but does not give authority to go beyond that limit. It is difficult to conceive any real purpose which the Legislature intended to accomplish by the insertion of said clause. How the county could ever equal *for road purposes* the maximum indebtedness fixed by the Constitution, when the Constitution fixes no maximum indebtedness for *such purpose*, we are not told, and for ourselves have been unable to ascertain. But even though respondent's contention were sound, yet the above clause would not act upon the facts of this case. It will be noted that Section 10520, *supra*, authorizes the county court to act "unless the debts of the county *for said purpose already equal*" the constitutional limit. There is no showing in this case that the roads debts of Clay County "already equal" any amount. It is the opinion of the writer that, in all probability, no useful application will ever be found for the above quoted portion of said section. As to that, however, we do not now determine, but must content ourselves with passing only upon the point as here involved.

We, therefore, hold that Section 10520 is sufficient in its terms to authorize said county court, under the facts here presented, to submit for the approval of the voters the proposed amount of bonded indebtedness.

II. It will be noted that Section 10520, *supra*, provides, among other things, that the order therein required to be made by the county court shall contain "a recital that the proceeds thereof are to be used for the improvement of the public roads of the county." That a recital, at least, to that effect is an essential prerequisite to a valid election, under said act, we entertain little doubt. At least all will agree in saying that if the order should contain a recital to the effect that the proceeds are to be used for some purpose

Court Order:
Roads in
Villages and
Special Districts.

other than the improvement of the public roads in the county a valid election could not be held. By way of example, if the order should recite that the proceeds or a part thereof were to be used for the purpose of building a private road, all would agree in saying that the order was fatally defective. If, on the other hand, the county court had contented itself with merely following the language of the statute, all would agree in saying that the order was good. The county court, however, did not content itself with following the exact language of the statute, but it recited in said order that the proceeds are to be used for the improvement of "*said* public roads of said county" and the word "*said*" by the language of the order itself clearly refers to the roads shown by the plat presented by the petitioners and now on file with the county clerk, a copy of which, by stipulation, is now before us.

As mentioned in the statement of facts the roads proposed to be improved, as shown by the plat, include a total of five and one-third miles of roads within several small incorporated towns or villages in said county, which mileage supplies connecting links for the rural roads approaching and passing beyond said incorporated villages; and also ninety-nine miles of road lying within the boundaries of certain designated special road districts. So that in effect, at least, said order recites that the proceeds of said bond issue are to be used in improving approximately ninety-eight and two-thirds miles of public roads in said county lying without any incorporated town or city or special road district, ninety-nine miles of public roads in said county lying within special road districts and the said five and one-third miles of public road in said county passing through certain specified small incorporated towns or cities, all of said roads forming a connected system of county highways or roads.

If then the above mentioned short sections of proposed improved roads running through the incorporated cities and towns along the route of the proposed improvement and sections of said proposed improvement

lying within the designated special road districts are "*public roads*," within the meaning of the Constitution and act authorizing said bond issue, the order of the county court was not defective and registration of the bonds should not for that reason be denied. If, on the other hand, said portions of the proposed improvement are not "*public roads*," within the meaning of said constitutional provision and act, then the order was defective and there would be no warrant for now registering said bonds. A solution of the question, therefore, will be found to depend upon the definition which shall be given the term "*public roads*" as used in said act.

Webster's New International Dictionary, title "Road" says: "Road is generally applied to highways, but has a broader, generic sense including highways, street, lane, etc."

In 37 Cyc. 16, the following definition is given: "In its broadest sense the term 'road' is synonymous with 'way' and thus applies to any place set apart and appropriated, either *de jure* or *de facto*, for the purpose of free passage, whether by public authority or by the general license or permission of the owners of the land, and also to private ways. More commonly in legal acceptance the term 'road' is regarded as synonymous with 'highway.' It is said to be a generic term for all kinds of ways, and thus includes highways, streets, alleys and lanes," citing many authorities.

"As a generic term it [road] includes highway, street, and lane." [24 Am. & Eng. Ency. Law (2 Ed.), 986.]

The term "road" or highway has been many times construed to include city streets as well as rural roads. [Abbott v. Duluth, 104 Fed. 833; Northwestern Telephone Exch. Co. v. City of Minneapolis, 81 Minn. 140; Chamberlain v. Iowa Telephone Co., 119 Iowa, 619; Sanderson v. Texarkana, 103 Ark. 529; Brace v. N. Y. Central R. R. Co., 27 N. Y. 269; St. Louis v. Realty Co., 259 Mo. 126, 1 c. 134.] Many other cases might be cited to the same effect. A review of the authorities will disclose that the proper definition of the term "road" in an instant case depends

upon the legislative intent as revealed by the context of the act wherein the term is used.

It was the undoubted purpose of the above mentioned 1906 amendment of our Constitution to provide a way whereby counties might be authorized to raise, by bond issue, supported by a tax upon all the property in the county, funds of sufficient amount to enable the county to construct a connected system of modern roads throughout the county. This amendment is but in keeping with the general public desire for improved road conditions brought about, no doubt, by the improved facilities for travel and a fuller realization of the idea that the development or progress of the State or county is dependent in a large measure upon the amount and character of its highways.

The constitutional amendment, above mentioned, provides that the county may be allowed to become thus indebted for the purpose of constructing or improving the roads, etc., "therein." Section 10520 et seq., which undertook to put into operation this additional power, provides that one hundred taxpaying citizens may petition the county court asking that a proposition be submitted to the qualified voters to bond the county for the purpose of improving the roads, etc., "in said county." Later in that act the term "public roads of said county" is used, but the term "of the county" as used does not, we think, materially limit the meaning of the term "in the county," theretofore used in said section, and in the constitutional amendment.

We have seen above that the term "public road" is sufficient in its scope to include "city street," and that such a construction may be given it if it is consistent with the true intent of the act.

Was the purpose and intent of the constitutional amendment and subsequent legislative enactments, in enabling the raising of such large funds for the purpose of building an improved county system of connected modern roads, to provide only for improving rural roads and to make no provision for providing funds for insuring an equally good improvement upon those small connecting

links of road lying within the incorporated towns or cities along the routes of those cross-county roads? Or was it the intention that provision should be made for raising funds for a uniform connected system of improved highways so that the same might (if condition required) be made free from small stretches of mud holes or unimproved roadways where the same passed through such towns and cities? That the latter intention is certainly consistent with the purposes sought to be subserved is, we think, very apparent. To hold otherwise would be to apply retrogressive construction to progressive legislation. Courts cannot make laws, neither should they unmake them; but whenever permissible and consistent with sound rules of construction should allow that construction which is in keeping with the purpose sought to be obtained and not inconsistent with the progress of the times.

We, therefore, hold that the roads specified by the county court in its order are "public roads" within the meaning of said act and the constitutional amendment authorizing the same, and that the order of the county court was not defective in that regard.

III. We are aware that the conclusion above reached does in a measure conflict with some of the language used in a portion of paragraph V of the recent case of State ex rel. St. Louis County v. Gordon, 268 Mo. 713, 188

**Use of Fund
to Improve
City Streets.**

S. W. 160, l. c. 165, wherein it was, in effect, said that proceeds from a bond issue, authorized under the above statute, could not be used upon the streets of an incorporated city and that said cities could not share in it. Upon a careful re-examination of that opinion, it does not appear that the exact point here discussed was properly lodged in that case, but that what was said thereon was, strictly speaking, *obiter dictum*, in response to an earnest request upon the part of *amici curiae*.

Upon a reconsideration of the question we have reached the conclusion that the language therein employed is too broad. What was there said was based upon and apparently intended as in harmony with the rule announc-

ed in the cases of State ex rel. Kirkwood v. County Court, 142 Mo. 575, and Green City v. Martin, 237 Mo. l. c. 484.

With the holdings in those two cases, and the approval thereof in the recent case to which reference is above made, we now find no fault, but only undertake to say that they are, strictly speaking, not applicable to the issue now before us. The case of State ex rel. Kirkwood v. County Court, *supra*, held that a statute which undertook to authorize the county courts to pay out of the county's road and bridge fund a certain per cent thereof to the city treasurers of incorporated towns to be, by said municipalities, spent generally upon its roads and streets, was unconstitutional, because in violation of the constitutional inhibition against grants of public money to a municipal corporation.

In the case at bar, we are not dealing with a statute which makes a grant of public money to a municipal corporation but with a statute *expressly authorized by the Constitution* and which puts into operation a constitutional provision whereby money may be raised to build a connected system of public roads in the county. The fact that a portion of this fund as authorized is for the purpose of improving portions of city streets over which parts of said proposed improved roads run does not violate the constitutional provision against grants to a municipal corporation, but rather may be said to be in complete harmony with the Constitution, as amended in 1906, and under the plan contemplated the use of a part of the money in improving city sections of the proposed improved roads is for a county use or purpose (at least a *quasi-county* use or purpose), as contradistinguished from a purely municipal use, as would be the case were the fund to be turned over absolutely to the municipality to be used as it might direct in purely local and general municipal street improvement. We think there is a vast difference between turning over a county fund to a municipal corporation to be spent as the municipality might direct for purely municipal functions (which was held in the above case would not be lawful), and the use of parts of the authorized county fund here involved, for

improving small portions of city streets that are used to form connecting links in, or small sections of, a connected system of public roads of the county (which we now hold, in this case, to be permissible and lawful).

The case of *Green City v. Martin*, supra, held that the township trustees of a county under township organization could not be compelled, by mandamus, at the instance of an incorporated city lying within such township, to turn over to said city a portion of said township's special road-and-bridge fund raised by taxation in 1909 under authority of the constitutional amendment of 1908 (now section 22 of article 10 of the Constitution), because at the time said taxes were levied and became due there was no statute which authorized such division of said taxes. That decision cannot be considered as in point here, and does not, we think, in any manner, conflict with the conclusions reached above.

As expressly stated in the opinion, it was from the viewpoint of the two above cases that the above mentioned discussion was made in *State ex rel. St. Louis County v. Gordon*, supra.

In so far, therefore, as the case of *State ex rel. St. Louis County v. Gordon* held that a county fund could not be granted to a municipality, we think the holding is correct; but in so far as it may be said to express the thought that a portion of the proceeds of bond issues as here involved cannot be used for improving portions of city streets *which form connecting links in a county system of roads*, we are of the opinion, for the reasons stated in paragraph II above, that such view is an erroneous one and should not be followed.

IV. We have not overlooked the argument by respondent urging, as a ground against the registration of said bonds, the point that the city and special road district authorities are said to have the exclusive control over the streets and roads within their respective territories and that, therefore, the county court is without authority to make the proposed improvements within cities and special road districts. But

Control of
Funds.

we do not here determine that point, for the reason that we are of the opinion that the determination of that question is not here involved. The issue raised by this proceeding have to do solely with the validity of the bonds proposed to be issued and now presented for registration with the State Auditor.

The question as to who will supervise the proposed improvements cannot affect the validity of the bonds. That is a matter that can arise only after the bonds are issued and the money is ready for the expenditure and not here where we are concerned merely with the question of raising the money.

We may be pardoned for an expression *obiter dictum* to the effect that it would indeed be a peculiar situation if it should not be found that someone had the authority, at least the implied authority, to see that an authorized fund was applied to the legitimate purposes of its creation, and that we anticipate little difficulty will be encountered in applying the fund to the accomplishment of this end.

From the foregoing conclusions, it follows that our permanent writ of mandamus should issue herein. It is so ordered. *Graves, C. J., Woodson and Blair, JJ.*, concur; *Bond, J.*, concurs in paragraph two and in the result; *Walker, J.*, dissents in separate opinion; *Faris, J.*, dissents, and concurs in separate opinion by *Walker, J.*

WALKER, J. (dissenting).—I do not concur in the conclusion reached in the majority opinion that the streets of an incorporated city or town are within the purview of section 10520, Revised Statutes, 1909, and hence may be included as a part of the system of public roads of a county authorized to be improved by a compliance with said statute. It may be admitted, in general parlance, that a public road may include a street; but when either term is used in a statute, a strict compliance with which is necessary to authorize the incurring of an added burden of taxation, more particularity is not only necessary but is, so far as I have been able to

ascertain, uniformly employed. Under the terminology of our statute, without unnecessarily burdening this dissent with illustrations, of which many will be found, a public road means a highway outside of the corporate limits of a city or town, while a street means a highway within such limits. That this is true is evident, not only from the distinctive statutory use of the terms, but from the fact that upon the incorporation of a municipality it becomes, so far as its autonomy and all that pertains thereto is concerned, a separate entity. Not only its government, but, as one of the incidents of such government, its maintenance, must be provided for by those within its borders. Not the least of these is the care and maintenance of its streets. In the absence of a specific statute so providing, it has no authority to expect, demand or receive aid from the county in discharging any of its municipal duties. Nor has the county court, a purely administrative body charged with the management of the county's business by express statutes, any authority to extend such aid or in any way interfere with the conduct of the affairs of any such municipality. I am therefore of the opinion that the term "public road" as used in the statute (Sec. 10520, *supra*) was not contemplated or intended to include the streets in an incorporated city or town; and, if such inclusion were permissible, that no authority is conferred upon a county court to expend any part of the funds arising from the issuance and sale of bonds under the statute cited, in the improvement of the streets of such a municipality. It may be contended that this statute is largely remedial. Let this be granted. Under no rule of interpretation can the meaning or application of a statute, remedial or otherwise, be so extended as to authorize those charged with its enforcement to exercise power where they have no jurisdiction. A county court has none to improve the streets of an incorporated city or town, and it was not so intended by the framers of the statutes.

Faris, J., concurs.

LEONORA M. PHILLIPS v. WESTERN UNION
TELEGRAPH COMPANY, Appellant, and SAM-
UEL KENZELL, a minor.

In Banc, May 22, 1917.

1. **TORT: Messenger Boy: Right to Street.** A messenger boy sent out by a telegraph company to deliver a telegram does not travel on the street by permission of the company, but in the exercise of a valuable public right; that right is a part of his own equipment for the service in which he engaged; and for his torts, committed in playfulness in no wise connected with the performance of his work or inconsistent with the terms of his employment, the company is not liable.,
2. ———: ———: **Running Into Pedestrian.** A messenger boy with a telegram in his hand ran along the sidewalk on which plaintiff was standing, and coming up to a newsboy with a bundle of papers under his arm asked him for a paper, and being refused snatched one from the bundle and ran, and looking over his shoulder as he ran collided with plaintiff with such force as to knock her ten feet into the street and seriously injure her. *Held*, that the telegraph company was not liable in damages for the tort.

Held, by WOODSON, J., dissenting, that the same rule of law applies as would apply if the injury had been inflicted by the telegraph company's automobile instead of the messenger boy's body coming into negligent collision with plaintiff; that he was performing the master's business at the time the injury was inflicted, and had he not been so engaged he would not have committed the tort, and the mere fact that he side-stepped a few feet from his journey to gratify some personal desire does not change the rule.

Appeal from St. Louis City Circuit Court.—*Hon. Rhodes E. Cave*, Judge.

REVERSED.

Albert T. Benedict, Franklin Ferriss and Henry T. Ferriss for appellant.

(1) Where the injury to a third party is caused by the servant's negligence in the performance of his duties and the liability of the master is based solely

on the doctrine of *respondeat superior*, each is severally liable to the injured party, although for different reasons, but they are not joint tortfeasors and cannot be sued jointly. *Campbell v. Phelps*, 1 Pick. 65; *Parsons v. Winchell*, 5 Cush. 592; *Mulchy v. Methodist Society*, 125 Mass. 487; *Page v. Parker*, 40 N. H. 47; *Brewing Co. v. Przbyiski*, 82 Ill. App. 361; *McNemar v. Conn*, 115 Ill. App. 36; *Bailey v. Bussing*, 37 Conn. 349; *Tel. Co. v. Olsson*, 40 Colo. 264; *Campbell v. Sugar Co.*, 62 Me. 566; *Clark v. Fry*, 8 Ohio St. 377; *French v. Construction Co.*, 76 Ohio St. 509; *McGinnis v. Railroad*, 200 Mo. 359; *Warax v. Railroad*, 72 Fed. 637. (2) Plaintiff's evidence failed to sustain the claim that the collision was due to the negligence of Kennell in respect to any act or deed required by or incident to his employment; on the contrary, the plaintiff's evidence demonstrated that the collision was directly occasioned by Kennell's conduct outside the scope of his duties. *Hillsdorf v. City*, 45 Mo. 94; *Walker v. Railroad*, 121 Mo. 575; *Farber v. Railroad*, 32 Mo. App. 381; *Hartman v. Muehlbach*, 64 Mo. App. 566; *Collette v. Rebori*, 107 Mo. App. 720; *Grattan v. Suedemeyer*, 144 Mo. App. 723; *Slater v. Thresher Co.*, 5 L. R. A. (N. S.) 598; *Geraty v. Ice Co.*, 16 App. Div. N. Y. 177; *Railroad v. Harvey*, 144 Fed. 806; *Guille v. Campbell*, 49 Atl. 938; *Thurston v. Railroad*, 168 S. W. 236; *Mfg. Co. v. Roofing Co.*, 183 S. W. 659. With respect to his manner of walking along the streets, Kennell's position was analogous to that of an independent contractor; the telegraph company would not be liable for his negligence in so doing.

William H. McClarin and Jones, Hocker, Sullivan & Angert for respondent.

(1) The defendants are jointly or severally liable in this case, and they were properly joined as defendants in this suit. Therefore, the court did not err in overruling the appellant's motion to elect, or its demurrer, or its objection to the introduction of evidence, grounded on non-joint liability. *Harriman v. Stowe*,

57 Mo. 99; Steinhauser v. Spraul, 114 Mo. 551; Kanfield v. Railroad, 59 Mo. App. 362; Jewel v. Bolt & Nut Co., 231 Mo. 206; Schwyhart v. Barrett, 145 Mo. 332; Stotler v. Railroad, 200 Mo. 119; Lanning v. Railroad, 196 Mo. 656; McGinnis v. Railroad, 200 Mo. 358; Hutchinson v. Safety Gate Co., 247 Mo. 71; Whiteaker v. Railroad, 252 Mo. 450, 239 U. S. 421; Railroad v. Thomson, 200 U. S. 206; Railroad v. Bohon, 200 U. S. 221; Railroad v. Dixon, 179 U. S. 131; Railroad v. Miller, 217 U. S. 209; Railroad v. Willard, 220 U. S. 413; Sec. 1734, R. S. 1909. The appellant, by answering to the merits and not standing on its demurrer and motion to elect, waived the point raised thereby. White v. Railroad, 202 Mo. 561; Hansen v. Neal, 215 Mo. 277. (2) The evidence on the part of plaintiff conclusively showed that defendant Kenzell was in the employ of the defendant and at the time was engaged in and about its business as its servant. Fleischman v. Fuel Co., 148 Mo. App. 117; Long v. Nute, 123 Mo. App. 209; Hays v. Hogan, 180 Mo. App. 237; O'Malley v. Construction Co., 255 Mo. 386; Curley v. Vehicle Co., 68 App. Div. (N. Y.) 21; Seaman v. Koehler, 122 N. Y. 646; Wilde v. Railroad, 53 N. Y. 156; Pearlstein v. Express Co., 177 Mass. 530; Tuomey v. Fogart Co., 22 N. Y. Supp. 930; Slothower v. Clark, 191 Mo. App. 105; Phillips v. Tel. Co., 184 S. W. 958. (3) Kenzell's negligence having been committed in the course of the performance of his duties, was the negligence of the master. Ryan v. Keane, 211 Mass. 543, 47 L. R. A. (N. S.) 142; Phillips v. Tel. Co., 184 S. W. 958; Whiteaker v. Railroad, 252 Mo. 438; Garretson v. Duenckel, 50 Mo. 104; Meade v. Railroad, 68 Mo. App. 92; Brill v. Eddy, 115 Mo. 596; Voegeli v. Co., 49 Mo. App. 643; Schamp v. Lambert, 142 Mo. App. 573; Winfrey v. Lazarus, 148 Mo. App. 388; Bouillon v. Light Co., 148 Mo. App. 473; Red v. Railroad, 161 Mo. App. 522; Moore v. Light Co., 163 Mo. App. 270. (4) Kenzell not having stopped in grabbing the paper mentioned in the evidence, but having grabbed it while on his way to appellant's office, had not

Phillips v. W. U. Tel. Co.

deviated from nor abandoned the pursuit of his duties to the appellant, so as to relieve it from liability, inasmuch as he was continuing on to the office of the appellant when he struck Mrs. Phillips. This was a question of fact which has been resolved against the appellant by the jury. *Long v. Nute*, 123 Mo. App. 209; *Slothower v. Clark*, 191 Mo. App. 105; *Vaneman v. Laundry Co.*, 106 Mo. App. 592; *Jones v. Weigand*, 134 App. Div. (N. Y.) 644; *Lovejoy v. Lackland*, 66 Neb. 469; *Whiteaker v. Railroad*, 252 Mo. 452.

BROWN, C.—This is a suit for damages suffered by plaintiff under the following circumstances:

The defendant Western Union Telegraph Company is a New York corporation engaged in the business of receiving, transmitting and delivering communications by telegraph between different places in the United States, including the city of St. Louis, in which it had offices for that purpose, among which was an office on the southwest corner of Olive Street and Grand Avenue. Olive Street, at that place, extends east and west while Grand Avenue crosses it, extending north and south. The defendant Kenzell, at the time of the injury, which occurred about December, 28, 1912, was a messenger boy sixteen years old, in its service, whose duty it was to deliver telegrams. The evidence tends to show that about seven o'clock in the evening of that day the plaintiff was standing on Grand Avenue in front of the show window of a candy store on the southeast corner, waiting for an approaching automobile to pass, so that she could step down into the street and cross to the southwest corner, on which the telegraph office was situated. A news boy with a bundle of papers under his arm stood on the sidewalk about seven feet north of her when the defendant Kenzell came running from the east along the sidewalk on the south side of Olive Street with a telegram in his hand, and said to the news boy "give me a paper." The news boy refused, when Kenzell snatched one from the bundle and ran, looking over his shoulder, and collided with plaintiff with such force that she was

knocked ten feet into Grand Avenue and very seriously injured. There was a verdict and judgment for \$10,000 against both defendants, from which the Telegraph Company alone has taken this appeal. It does not complain of the amount, but does strenuously insist that it is not liable upon the facts as above stated, and this is the point to which our attention will be given.

In going into the consideration of this case it is well to have in mind that the boy who caused the injury which is the subject of the suit was not traveling on the street by permission of his co-defendant, but in the exercise of a public right valuable to himself as a facility

**Servant's Tort:
Liability of
Master.**

for gaining a livelihood as well as to his employer. Had he not possessed this right his employer could not have conferred it nor taken it away. It went with his service as far as it was necessary to the performance of the duty involved and no further. In all other respects and for all other purposes it remained his own. It was, like his health and strength, a part of his own equipment for the service in which he was engaged. We cannot arbitrarily assume that by the terms of his employment, he was forbidden to seek, while on these trips, his own pleasure or profit in any manner consistent with the performance of his whole conventional duty, nor was the defendant under any obligation to so restrain his liberty of action, in the ordinary use of the public easement, although, should it authorize him to commit a wrong, as by inciting him to dangerous speed in a crowd, it would be liable for the consequences upon familiar principles unconnected with any issue in this case, and having no connection with the relation of master and servant.

On the other hand, neither beasts nor inanimate things participate in these public uses of their own right, but only have status in the public highway by right of their owners. For this reason one who employs a beast upon the street must do so under such management and control as will provide reasonably for the safety of persons and their property. Had this boy

been furnished by the defendant with a horse to ride or an automobile to transport him in the performance of his duties, his management of these facilities would have been the management of his master, which would have been liable for his acts and omissions in such management.

These principles are familiar to all, and are firmly embedded in the foundation of our jurisprudence, and we would not feel that it is necessary to mention them were it not that this unfortunate accident has already been the subject of adjudication by an appellate court of this State in a suit brought by the husband of plaintiff (*Phillips v. Western Union Telegraph Company*, 194 Mo. App. 458), in which the liability of the appellant was upheld. While this does not constitute an adjudication of the right in favor of this respondent, it is persuasive authority as the decision by a distinguished court of the same question, and is the only authority to which counsel has directed our attention bearing upon the question which seems to us to be the controlling one in this case.

Respondent's counsel meets these simple rules with the proposition that human legs, while safe and proper instruments of transportation when carefully used, are, like automobiles and other things of a similar nature, dangerous when used negligently, and that the master has as much control over the legs of his servant as over his own animal or machine; and cites *Ryan v. Keane*, 211 Mass. 543, as an authority, and the same case is cited and quoted by the St. Louis Court of Appeals in *Phillips v. Western Union Telegraph Company*, *supra*. In the Massachusetts case the accident occurred in the stable yard of a livery, in which a customer waiting for a conveyance he had ordered was roughly pushed, run against and injured by the employee who had been serving him, and who was on foot. We do not see the relevancy of this case, in which the employer failed in the duty of protecting his customer from negligent injury by his own servant upon his own premises to which he had been invited, to the duty of the master to control

the movements of his messenger while walking upon the public street.

The respondent has also cited the decision of this court In Banc in *Maniaci v. Interurban Express Co.*, 266 Mo. 633. In that case the defendant express company had in charge of its office and business at Edwardsville, Illinois, one Joiner, "a person of violent temper, quarrelsome disposition and without control over his passions" and "a dangerous and unfit person to place in such a position," which it well knew; a dispute had arisen between Joiner and plaintiff over the refusal of plaintiff to sign a receipt for a consignment of fruit previously delivered to him; and Joiner had telephoned him to come to the office; and while he was doing so intercepted him, presented the receipt, demanded that he sign it and while he was doing so "under protest" shot him. In holding the express company liable under the circumstances this court said: "The plaintiff was there upon the invitation of defendant for a legitimate purpose. He and Joiner were in the midst of the very business which had called them together, at the time said shooting occurred. In addition thereto, the petition alleges that plaintiff was in the very act of signing the receipt when he was suddenly shot." It also cited a number of authorities sustaining the principle clearly stated by Judge Cooley, *Cooley on Torts* (3d Ed.) sec. 626, as follows: "The master is liable for the acts of his servant, not only when they are directed by him, but also when the scope of his employment or trust is such that he has been left at liberty to do, while pursuing or attempting to discharge it, the injurious act complained of. It is not merely for the wrongful acts he was directed to do, but the wrongful acts he was suffered to do, that the master must respond.

There is nothing in any of these authorities which applies the doctrine of *respondeat superior*, or the principles on which it rests, to the facts of this case as already stated, and we are not surprised that the diligent search indicated by the briefs of eminent counsel in this case have failed to disclose one. Had the messenger

boy, charged as the direct perpetrator of the injury to plaintiff, been charged by the Telegraph Company with the duty of delivering a telegram to her and taking a receipt therefor, and he had presented it and demanded the receipt, and had a quarrel arisen between them as to the proper method of executing it, in which he had lost his temper by reason of her protests, and thrown her upon the pavement or otherwise chastised her to her injury, the Maniaci case would be a direct authority in favor of the master's liability. The same principle is supported more or less directly by the authorities which it cites. They all put the master's liability upon the ground that in the performance of those acts which can be done only by the use of its powers and under its direction, it is responsible for the conduct of the servant, even though, in the accomplishment of that object, he commits a wilful tort. There is nothing in any of them that implies the duty to regulate the gait of one who walks along the street for such purpose. Had economy indicated that the duty of delivering telegrams be united in the boy with the duty of delivering medicine for the drug store in which defendant's office was situated, a search of his pockets might disclose either telegrams or medicine or both, but we do not think their presence would be of value to fix upon either druggist or telegraph company a liability for his want of circumspection in using the easement which was freely open to him for himself despite the objections of either or both.

We have already referred to the paucity of authority upon the liability of the master for the use by his servant of the public street. The most of us frequently send our servants to the post office or the store, or, if we have no one regularly employed to do these errands, expend a nickel or a dime for a special messenger for such purposes. Traveling salesmen in the employ of commercial houses go from store to store and house to house in the pursuance of their calling. Boys engaged in this employment frequently encounter their juvenile enemies and we, who employ them, do not think of worrying over our financial responsibility for the result.

The youth who goes to the post office with our letter on a Fourth of July morning may carry a bundle of fire crackers and distribute them freely along the route, or the festive drummer on a holiday occasion may fall over a slight and quiet traveler, or the boy who carries a parcel may, at the same time, try to control his boon companion, the bull pup, with a string. Many of us have seen painful accidents resulting from such conditions, but have seen no legal authority for holding the master liable in damages growing out of the rollicking movements of his servants, on the street, even though his own business may have taken them to the very place at that very time, unless he instigates the wrong which caused the injury.

Nor are we prepared to hold that a corporation is, in this respect, subject to a more stringent rule of liability than a natural person.

The judgment of the circuit court for the city of St. Louis is therefore reversed. *Railey, C.*, not sitting.

PER CURIAM.—The foregoing opinion of BROWN, C., is adopted by the Court In Banc as the opinion of said court. All the judges concur, except *Woodson, J.*, who dissents in an opinion filed.

WOODSON, J. (dissenting).—I dissent from the majority opinion for the reason that the same rule of law applies to the facts of this case as if the injury had been inflicted by an automobile instead of being caused by the messenger's body negligently coming in physical contact with the plaintiff. The messenger was performing the master's business at the time he injured the plaintiff, and had it not been for that fact he would not have been pursuing the journey which resulted in the injury, and the mere fact that he sidestepped a few feet to gratify some personal desire does not change the rule. In that case, as in this, he would have been about the master's business and the negligence in the one is identical with that in the other; the authorities cited abundantly so hold.

THE STATE ex inf. VIRGIL CONKLING, Prosecuting Attorney, ex rel. JOHN C. HENDRICKS et al. v. JAMES M. SWEANEY et al., Plaintiffs in Error.

In Banc, May 22, 1917.

1. **BILL OF EXCEPTIONS:** No Order of Court. It is not a necessary prerequisite, in a case arising since the passage of the Act of 1911, to the right to file a bill of exceptions, that the trial court should make an order during the term at which exceptions were taken granting leave to file the bill thereafter. If the exceptions which comprise the bill were taken at the May term, 1912, and no entry or order was made at that term granting leave to file the bill thereafter, a bill presented, allowed and filed at the November term, 1914, being prior to the time plaintiffs in error were required to serve their abstract, will be considered for purposes of review.
2. **VILLAGE OR TOWN SCHOOL DISTRICT:** Division Into Two or More Districts. Section 10881, Revised Statutes 1909, does not provide a way for dividing a town, city or consolidated school district into two or more districts. Nor do any other statutes provide any direct way by which such division can be accomplished.

Error to Jackson Circuit Court.—*Hon. William O. Thomas*, Judge.

AFFIRMED.

Smart & Strother for plaintiffs in error.

(1) The division of the School District of Dallas as shown by the record herein, was authorized by law. R. S. 1909, secs. 10837, 10839, 10840, and 10881; School District No. 1 v. School District No. 4, 94 Mo. 620. (2) In construing statutes "words and phrases shall be taken in their plain or ordinary and usual sense," and "if possible, some meaning must be given every word in an act." R. S. 1909, Sec. 8057; *Collier Estate v. Paving & Supply Co.*, 180 Mo. 379; *St. Louis v. Lane*, 110 Mo. 258. (3) "Where a court of last resort construes

a statute, and that statute is afterwards re-enacted or continued in force, without any change in its terms, it is presumed that the Legislature adopted the construction given to it by the court." *Handlin v. Morgan County*, 57 Mo. 116; *Northcutt v. Eager*, 132 Mo. 277.

(4) Statutes are to be construed as to give effect to all their provisions and to harmonize their various provisions with each other, and so as to effectuate the legislative intent. *State to use v. Heman*, 70 Mo. 451; *State ex inf. v. Burkhead*, 187 Mo. 35; *State ex rel. v. Gordon*, 261 Mo. 646-649; *Lexington v. Bank*, 130 Mo. App. 692.

(5) The proceedings leading up to the division of the School District of Dallas were in strict accordance with the statutes. R. S. 1909, secs. 10837, 10879; *State ex rel. v. Andrae*, 216 Mo. 617; *School District v. Chappel*, 155 Mo. App. 498.

Sebree, Conrad & Wendorff for defendants in error.

(1) The bill of exceptions was not filed for over two years after the term at which the motion for new trial was overruled had elapsed, and no leave was ever granted extending the time for filing such bill of exceptions; consequently, the case must be decided upon the record proper. Sec. 2029, R. S. 1909; *Laws 1911*, p. 139.

(2) The attempt of plaintiffs in error to disorganize the School District of Dallas and cut off the eastern portion and form thereof a common school district was without authority of law and void, and the judgment of the lower court ousting plaintiffs in error was right and should be affirmed. *State ex rel. v. Fry*, 186 Mo. 198; *School District v. McFarland*, 154 Mo. App. 411; *State ex rel. v. Fisher*, 119 Mo. 351; *Ex parte Snyder*, 64 Mo. 61; *State ex rel. v. Woodson*, 128 Mo. 514; *Heidelberg v. St. Francois Co.*, 100 Mo. 74; *State ex rel. v. Stobie*, 194 Mo. 57; *Capen v. Garrison*, 193 Mo. 348; *Williamson v. Brown*, 195 Mo. 328.

WILLIAMS, J.—This is a proceeding by *quo warranto* instituted in the circuit court of Jackson County, by the then prosecuting attorney of said county, at the relation of the directors of the School District of Dallas,

situated in said county, against the therein named defendants, whereby it is sought to oust the defendants from acting as school directors over territory which it is claimed by relators is embraced within the School District of Dallas. The circuit court entered judgment in favor of the relators and issued a writ of ouster against the defendants. Thereafter and in due time the defendants brought the suit to this court by writ of error.

The facts necessary to a determination of the issues involved may be stated substantially as follows.

The School District of Dallas is what is known as a town or village school district and was so organized in 1903 and the legality of said organization was affirmed by this court in the case of *State ex rel. v. Gill*, 190 Mo. 79. The relators now comprise the board of directors of said school district as originally organized, unless it should be determined in this proceeding that the original School District of Dallas had, prior to the institution of this suit, been divided into two school districts.

In the spring of 1912 a portion of the inhabitants of said school district, proceeding under and by virtue of section 10837, Revised Statutes 1909, undertook to divide the School District of Dallas into two separate districts. It appears that all of the matters required by said section were complied with and that the School District of Dallas was divided into two districts if there was legal authority so to do. The defendants, plaintiffs in error, are the directors of the new district attempted to be carved out of the old district. It is the contention of the relators, defendants in error, that there is no provision of law for dividing a town, city or consolidated school district into two districts and that, therefore, the whole proceeding was void and that the defendants were without authority to act as school directors of any portion of said territory. The contention of the defendants, plaintiffs in error, is that under Section 10881, Revised Statutes 1909, authority is to be found for the division which was made.

I. Before proceeding with the merits of the appeal there is one preliminary question that must be deter-

mined. Defendants in error contend that the bill of exceptions was not filed within time and that, therefore, our review must be limited to the record proper.

The facts underlying this point are as follows: The exceptions, which comprise the bill of exceptions, were taken at the May term, 1912, of said circuit court, which, of course, was after the Act of 1911 (Laws of 1911, pp. 139-140), relating to filing of bills of exception, became operative. During the said term of court the trial court did not make or enter of record an order granting leave to file the bill of exceptions thereafter. At the November term, 1914, plaintiffs in error presented their bill of exceptions and the trial court by order entered of record duly allowed the same and ordered the same to be filed and made a part of the record in the case. This, in point of time, was prior to the time the parties were required, under our rules, to serve their abstract of record.

Defendants in error, however, insist that since the court, during the term at which the exceptions were taken, did not make an order granting leave to thereafter file the bill of exceptions, the same was, therefore, filed without authority. We are unable to agree with this contention. We are of the opinion that the bill of exceptions was duly allowed and filed within proper time, as authorized by the Act of 1911, *supra*.

That said act contains much surplusage becomes apparent at a mere glance. It should be noted that all through the act the conjunction "or" is used and the permissive term "may be filed" is employed and not the imperative "shall be filed." If a law *should be* passed by the Legislature saying that an act "may be done within five, ten, twenty or thirty days" from a given time, could it be properly said that the act had to be done within five days? Would not the proper construction be that the act could be done at any time within thirty days and that the other portions of the law likewise giving permission to do the act in a shorter period were surplusage. That is very much the situation

with the Act of 1911. It provides that bills of exception "may be filed:"

(1) during the term of the court at which it is taken, or within such time thereafter as the court may by order entered of record allow, which time may be extended by the court or judge in vacation for good cause shown;

(2) or within the time the parties to the suit or their attorneys of record may in writing agree upon;

(3) (or) at any time before the appellant shall be required by the rules of the appellate courts to serve his abstract of record; *provided*, that if for any reason the bill of exceptions cannot be filed within that time then upon proper certificate from the circuit judge to the appellate court the appellate court shall continue or reset the case a sufficient time to allow the bill of exceptions to be filed and that the bill of exceptions may then be filed at any time before the rules of the appellate court require the abstract to be served by reason of the re-setting.

The provisions (1) and (2) above were formerly contained in section 2029, Revised Statutes 1909. That section was expressly repealed by the Act of 1911 and by said Act re-enacted with the portion (3) above, together with some rather indefinite directions as to what action the appellate courts should take in affirming cases, and an emergency clause putting the act into effect forthwith. To undertake to elucidate the legislative intent to such degrees of refinement as would give life to every part of the act would appear to be an impossibility. Why the act is in its present form, only facts *dehors* the record could possibly explain.

In the case at bar the right to file a bill of exceptions occurred after the Act of 1911 went into effect and we, therefore, have not before us the situation involved in the case of *Craig v. Railroad*, 248 Mo. 270 (later followed in the cases of *Bridge Company v. Corrigan*, 251 Mo. 667, and *Mitchell v. Sparlin*, 255 Mo. 124), wherein it was held that the enlarged rights granted by the Act of 1911 did not apply to those cases arising prior thereto in which the

right to file a bill of exceptions had terminated before the act became operative.

In the case of *State v. Rogers*, 253 Mo. 399 (a case which arose after the Act of 1911 was passed), in construing this act it was held that a bill of exceptions filed after the time granted by the court had expired, was filed in time under the provisions of the Act of 1911, if it were filed before the appellant was required by the rules of the appellate court to serve his abstract of record. We are of the opinion that that case was correctly ruled.

If then a bill of exceptions can be said to be properly filed after the expiration of the time granted by the trial court, why could not the same bill of exceptions be so filed on the same date, although no extension of time had ever been granted? Under the Act of 1911 what peculiar force or virtue is added to the right to file a bill of exceptions by the act of the court in term time granting an extension of time that is not to be utilized? None whatever, we must admit, except in those cases arising prior to the passage of the Act of 1911 where such extension of time would be necessary under the holding of the *Craig* case, *supra*, to keep alive and carry forward the old right under Section 2029, Revised Statutes 1909, until it came within the operation of the Act of 1911.

We, therefore, hold that with reference to all cases arising since the passage of the Act of 1911, it is not a necessary prerequisite to the right to file a bill of exceptions, that the trial court should make an order during the term at which exceptions are taken granting leave to thereafter file the same.

II. The only question presented upon the merits of this appeal involves a construction of Section 10881, Revised Statutes 1909. Said section is as follows:

“All the provisions of section 10837, relating to the changes of boundary lines of common school districts, and all the provisions of sections 10839 and 10840, relating to the division of property between common school districts, shall apply to town, city and consolidated districts.”

Plaintiffs in error contend that the above section authorizes the division of a *town, city or consolidated* school district into two new school districts, while defendants in error contend that it merely provides for changing the boundary lines of such school district, but does not provide for dividing the same into two new districts. After careful consideration of the statute, we have reached the conclusion that the above section does not provide a way for dividing a town, city or consolidated school district into two new districts. If Section 10881, *supra*, had provided that all the provisions of section 10837, Revised Statutes 1909, should apply to town, city and consolidated districts, then there could be no question but that provision had been made for so dividing such districts, because Section 10837, *supra*, expressly provides for dividing one common school district into two new districts. But instead of the Legislature saying that all the provisions of section 10837 should apply to town districts, it merely said that "all the provisions of section 10837 relating to the changes of boundary lines of common school districts" should apply. Referring then to Section 10837 we find that the only express provision therein for changing boundary lines is the provision for changing "the boundary lines of *two or more* districts." Other express provision is made for dividing one district into two new districts. It, we think, becomes at once apparent, that the provision for changing the boundary lines of *two or more* districts could not, by any process of construction, be held to provide a way for dividing *one* district into two new districts. Section 10881, in its present form, was enacted in 1909 (Laws 1909, p. 819, sec. 130). Prior to that time it had been expressly held by this court that the law providing for division of common school districts did not apply to village school districts. [State ex rel. v. Fry, 186 Mo. 198.] Such being the case the Legislature, when it enacted Section 10881, knew that the provisions of Section 10837, relating to the division of one common school district into two new districts, would not apply to town or consolidated districts unless it so provided in the act, and knowing this to be true and failing

State ex inf. v. Sweaney.

to so provide it would be but to do violence to the plain language used to hold that it expressed an intention to apply provisions other than those expressly mentioned. To so hold would be to violate the well known canon of statutory construction, viz.: That the expression of one thing is the exclusion of another.

Upon a reading of the revised school act passed in 1909 (Laws 1909, p. 770 et seq.), it would appear that there was a very good reason why the Legislature did not provide that the provision for dividing a common school district into two new districts should also apply to town, city or consolidated districts. Section 119 of said act (now Sec. 10870, R. S. 1909), provides that town, city or consolidated school districts *may* disorganize, upon certain proceedings had as therein specified, only when authorized by a vote of *two-thirds* of the resident voters and taxpayers of said district, and then provides that the territory thereof, after disorganization, may be organized into a common school district.

It, therefore, becomes apparent that should we construe Section 10881 as plaintiffs in error contend, it would virtually render nugatory the provisions of Section 10870, *supra*, and would, in effect, provide that the district could be disorganized without the vote of two-thirds of the voters and taxpayers. Of course, if a town, city or consolidated district should by a two-thirds vote disorganize the territory thereof could, under the provisions of Section 10870 be organized into a common school district and this common school district in turn, under the provisions of Section 10837, be divided into two new districts. Plaintiffs in error, however, did not undertake to proceed by that route, but have undertaken to accomplish the same result by the decision of a board of arbitration acting by appointment of the county superintendent of public schools, as provided by Section 10837, *supra*. We are of the opinion that the provisions of Section 10837, under which plaintiffs in error acted, have no application to town, city or consolidated school districts.

Plaintiffs in error, however, contend that the construction which we have given Section 10881 renders useless that portion of said section which provides that "all the provisions of Sections 10839 and 10840 relating to the division of property between common school districts shall apply to town, city and consolidated districts," because, as they contend, said Sections 10839 and 10840 apply only when new districts are created, and if it is held that a town, city or consolidated district cannot be divided into new districts then said sections could never apply and the "fundamental rule of statutory interpretation, that, if possible, some meaning must be given every word in an act," is thereby violated. Defendants in error contend that this result would not follow and that Sections 10839 and 10840 do not apply exclusively to the situation arising from the formation of a new district. We will not here undertake to construe Sections 10839 and 10840. To do so would amount to nothing more than an *obiter dictum* in this case, for the reason that, even though the view of plaintiffs in error be correct that under our above construction the provisions of Sections 10839 and 10840 could never apply to town, city or consolidated districts, yet our above construction does not violate the spirit of the above rule of construction mentioned by plaintiffs in error. The rule referred to says that *if possible* such construction should be given as will give meaning to every word. We do not consider it *possible* (within the meaning of the above rule), proper regard being had for all the rules of construction, that said Section 10881, when read in the light of its own clear and unequivocal terms and in the light that the Legislature at the same time provided another method for disorganizing town, city or consolidated districts, can be properly construed differently from the construction which we have given it.

It therefore follows that the plaintiffs in error were without authority to exercise the functions of school directors over any portion of the territory embraced within the original School District of Dallas and that the judg-

State v. Swift & Co.

ment of ouster rendered against them was properly so entered.

The judgment is affirmed. All concur.

PER CURIAM:—The foregoing opinion of WILLIAMS, J., in Division Two is hereby adopted by the court in Banc. All concur.

THE STATE v. SWIFT & COMPANY et al.,
Appellants.

Division Two, May 29, 1917.

1. **CONSTITUTIONAL QUESTION: Untimely Raised.** A constitutional question is neither timely nor otherwise sufficiently raised by an assignment in the motion in arrest that "the facts stated in said information do not constitute a charge or offense under the Constitution and laws of this State" and by an allegation in the assignment of errors that the statute in question is in violation of section 8 of article 1 of the Constitution of the United States.
2. ———: **Assignment Must Be Specific.** To raise a constitutional question the particular provision of the Constitution alleged to be violated must be pointed out.
3. ———: **Previously Decided.** A plea of unconstitutionality will not confer jurisdiction where the Supreme Court has theretofore held the statute in question valid.
4. ———: **Appeal: Transfer to Court of Appeals.** If the constitutional question was neither timely nor otherwise sufficiently raised and the statute under which defendant was convicted of a misdemeanor has previously been adjudged to be constitutional, the case will be transferred to the proper Court of Appeals for final determination.

Appeal from St. Louis Court of Criminal Correction.—
Hon. Calvin N. Miller, Judge.

TRANSFERRED TO ST. LOUIS COURT OF APPEALS.

A. & J. F. Lee and James A. Waechter for appellants.

Frank W. McAllister, Attorney-General, and *S. E. Skelley*, Assistant Attorney-General, for the State.

WALKER, P. J.—The defendants were charged under section 651, Revised Statutes 1909, with having offered for sale or kept on hand a colored substance composed of animal fat or vegetable oil in imitation of butter. This offense is denounced as a misdemeanor. [Sec. 658, R. S. 1909.] Upon a trial defendants were found guilty and their punishment assessed at a fine of \$50. They thereupon perfected an appeal to this court. The appellate jurisdiction of this court is invoked on the ground that a constitutional question is involved, although the record prior to the filing of the motion in arrest of judgment contains no intimation of this ground of jurisdiction. In the motion in arrest is found this allegation: “(2) that the information filed against defendants had been materially changed, altered and modified after it was filed against said defendants and did not constitute an information within the meaning of the Constitution of this State;” and further in paragraph 5 of said motion appears the following: “because the facts stated in said alleged information do not constitute a charge or offense under the Constitution and laws of this State.” The only reference thereafter to the question of jurisdiction is found in the assignment of errors, where it is alleged that the statute in question is in violation of article 1, section 8, of the Constitution of the United States.

There is here neither a timely nor otherwise sufficient raising of the constitutionality of the statute to give this court jurisdiction. The point might have been raised by a demurrer to the information or by a demurrer to the testimony supplemented by preserving the plea in the motion for a new trial.

**Constitutional
Question.**

Ex parte Holman.

However, if the objection to the statute had been timely it was not sufficiently definite to entitle it to consideration. To raise a constitutional question the particular provision alleged to be violated must be pointed out. [Lohmeyer v. Cordage Co., 214 Mo. 685.]

But it appears that the validity of section 651, Revised Statutes 1909, has been passed upon by this court and held not to be inimical to the Constitution. [State v. Bockstruck, 135 Mo. l. c. 356.] This is therefore not a live question and hence not a ground upon which the jurisdiction of this court can be invoked. [Schmidt v. Sup. Ct. U. O. F., 259 Mo. 491; State v. Evertz, 190 S. W. 287; State v. Wild, 190 S. W. 273; State v. Campbell, 214 Mo. l. c. 364; Dickey v. Holmes, 208 Mo. 664; Jones v. Anheuser-Busch Brewing Assn., 188 S. W. 82.]

The constitutionality of the statute in question not having been raised on a timely or sufficient manner and the same having been heretofore determined by this court, this case should be transferred for final determination to the St. Louis Court of Appeals, and it is so ordered. All concur.

Ex parte CHARLES L. HOLMAN, Petitioner.

In Banc, June 1, 1917.

HABEAS CORPUS. The opinion of the St. Louis Court of Appeals, quashing a writ of *habeas corpus* issued on behalf of petitioner, is adopted as the opinion of the Supreme Court, and the subsequent writ of *habeas corpus* issued by the Supreme Court in the same case is likewise quashed.

Habeas Corpus.

WRIT QUASHED.

I. H. Lionberger for petitioner.

Charles H. Daues for respondent.

Ex parte Holman.

PER CURIAM:—The opinion of the Court of Appeals, when the same case was in that court, is adopted as the opinion of this court in this case, and the writ is quashed, and the petitioner remanded to the custody of the officer.

All concur; *Graves, C. J.*, in a separate opinion, in which *Faris, J.*, concurs; *Bond, J.*, concurs in result only of the Court of Appeals opinion:

GRAVES, C. J. (Concurring).—By agreement this court determined to express its views upon the opinion of the St. Louis Court of Appeals, when Holman asked for writ of *habeas corpus* there. Upon this theory I concur in the result of the opinion of the St. Louis Court of Appeals. I do not concur in its adoption of the views of this court in *City of St. Louis v. United Railways*, 263 Mo. 387. To my mind the instant case does not necessarily require a determination of the mooted questions involved in the *United Railways* case, *supra*. But even if it did, there are other questions which would authorize the proposed investigation by the committee, all of which were fully covered in the resolution, and other proceedings of the legislative body and its committee. I therefore concur in the result of the opinion of the St. Louis Court of Appeals, leaving the questions involved in *United Railways* case open, so far as I am concerned, until the same are squarely passed upon by the United States Supreme Court, which to this date has never been done. *Faris, J.*, concurs in these views.

GRANITE BITUMINOUS PAVING COMPANY v.
PARK VIEW REALTY & IMPROVEMENT
COMPANY, ISAAC H. ORR, NINA REALTY
COMPANY et al., Appellants, Nos. 17593, 17594
and 17595.

In Banc, June 30, 1917.

REHEARING GRANTED: Immediate Decision Without Rehearing.

After a Court of Appeals has granted a motion for a rehearing, it cannot at the same time and immediately without a rehearing and without a re-submission, render judgment. When a rehearing is allowed the case stands for re-argument and re-submission, and a judgment rendered without re-submission is *coram non judice* and void.

**Held*, by BOND, J., dissenting, that the Court of Appeals had jurisdiction of the cause, and its judgment was at its worst a mere erroneous exercise of that jurisdiction, and in no sense a violation of the constitutional power vested in it to decide cases; and one of the judges of that court, deeming the judgment to be in conflict with certain designated decisions of the Supreme Court and of another court of appeals and having for that reason caused the case to be certified to the Supreme Court, that certification gave this court jurisdiction of the whole case, and it is before the Supreme Court for determination on the merits, just as if it had been brought to it by direct appeal from the circuit court, in total disregard of the error by which the judgment was reached in the Court of Appeals.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

REMANDED TO ST. LOUIS COURT OF APPEALS.

Collins, Barker & Britton for appellant.

When the Supreme Court on a proper transfer has jurisdiction of a cause, it will hear and determine the entire cause and not merely dispose of the point of difference in the Court of Appeals. *Sutton v. Cole*, 155 Mo. 206; *Fulkerson v. Murdock*, 123 Mo. 292.

Sturdevant & Sturdevant for respondent; *Charles W. Bates*, *amicus curiae*.

GRAVES, C. J.—These three cases are actions upon special tax bills. In each the lower court found for the plaintiffs. Appeals were taken to the St. Louis Court of Appeals, where the three were seemingly heard as one case, and they are so submitted here. The cases are in a very peculiar situation here. Upon a hearing in the Court of Appeals the judgments in the lower court were reversed, CAULFIELD, J., not sitting.

Motions for rehearing were filed, and evidently the two sitting judges who had joined in reversing the judgments divided in opinion, or at least one of them was shaken in his views. The result was that the motions for rehearing were set down for argument, and Hon. R. E. Rombauer in some manner appeared as special judge on this hearing had upon the motions for rehearing. The result of this hearing upon the motions for rehearing is thus expressed in the judgment before us:

“Now again come the said parties by their respective attorneys and the court having fully considered respondent’s motion for rehearing doth order that same be sustained, and that the judgment of reversal heretofore entered herein be set aside and for naught held and esteemed; and that said cause be remanded to said circuit court, city of St. Louis, with directions to that court to strike from the record so much of the judgment entry of that court as contains the words ‘with interest at the rate of eight per cent per annum from the date of the judgment until paid,’ and that the judgment thus amended, stand in full force and effect; and that said respondent recover of said appellants its costs and charges herein expended and have execution therefor. Opinion filed. But as Judge NORTON deems the opinion of this court to be in conflict with the decision of the Supreme Court in the case of *Morey Engineering & Construction Co. v. St. Louis Artificial Ice Rink Co.*, 242 Mo. 241. 146 S. W. 1142, and with that of the Kan-

sas City Court of Appeals in the case of Forrey v. Holmes, 65 Mo. App. 114, and asks that this cause be certified to the Supreme Court for a final determination, it is so ordered. Dissenting opinion by NORTON, J., filed."

Judge Rombauer wrote the opinion on the motion for rehearing, and properly styles it thus: "Opinion on Motion for Rehearing."

It should be noted that the first judgment of the Court of Appeals is an absolute judgment of reversal, and further that the last attempted judgment is one of affirmance, with a slight modification of the judgment *nisi* as to interest. It must be further noted that the judgment before us shows that the court granted a rehearing and that without a rehearing in fact or in law, instantly entered up a new and different judgment. So speaketh the only record before us.

In one breath the Court of Appeals says you are entitled to a rehearing of your case upon its merits, and in the next breath it enters, *instantly*, another and directly opposite judgment, without a further resubmission of the cause and without a rehearing in fact, after the motion for rehearing was sustained. By the same opinion such court both grants a rehearing and enters a new judgment. That the court had the right to hear argument on the motion for rehearing there can be no question. That with only two sitting judges in the case, a condition might arise which would call for the selection of a special judge there is no question. The trouble with the record is that it shows that there was no rehearing and no re-submission for judgment, after the motion for rehearing was sustained. When a rehearing is granted, it means what the term "rehearing" indicates, i. e. that the case is for re-argument and re-submission, before judgment can be entered therein. We do not mean that a prior judgment and opinion cannot be modified upon a motion for rehearing, and the motion then overruled, for that is often done in appellate practice, but what we do mean is, that when, upon a hearing had upon a motion for rehearing (whether

that hearing be upon oral argument or otherwise) the said motion for rehearing is sustained, then no new judgment can be rendered without a re-submission and actual rehearing of the cause. At least, absent a re-submission, no new judgment can be entered after a motion for rehearing has been sustained. The sustaining of such motion leaves the case just where it was when filed in the court.

This exact point has not been ruled in this State, so far as I find, but an analogous question has been specifically ruled. Thus in *Hurley v. Kennally*, 186 Mo. 225, we had before us a case in equity. Upon a trial *nisi* the chancellor found for the defendant and so entered his judgment. Upon motion for a new trial being filed by plaintiff he heard the motion, and sustained the same, and immediately entered judgment for the plaintiff on the merits. The cause was appealed here as indicated above, and VALLIANT, J., said:

"But when the motion for a new trial was sustained, the cause was at issue for trial again, the court had no authority to enter a judgment without another trial.

"Granting a new trial put the case in condition, so far as that court was concerned, as if there had never been a trial, and no judgment could thereafter be rendered upon the merits until a trial was had."

In principle the point there decided is the point here in issue. In 3 Cyc. 219, the rule is thus stated:

"When a rehearing is granted, generally, the cause is before the court for examination and decision as though it had never been considered and decided."

It follows that the judgments of affirmance entered in these cases without re-submission and rehearing, after motions for rehearing, had been sustained, are *coram non judice*, and void, and the cases are yet before that court for final determination. The court was without jurisdiction to enter a judgment of affirmance upon the mere hearing held upon a motion for rehearing directed to a judgment of reversal.

To the end that they may be finally determined by that court, we remand the cases to the St. Louis Court of Appeals.

All concur, except *Williams, J.*, not sitting, and *Bond, J.*, who dissents in opinion filed.

BOND, J. (dissenting).—I cannot concur in the discussion or result reached in the learned majority opinion. My reasons are these: The judgment of the court of appeals upon the motion for re-hearing involves, in substance, the sustention of that motion and the entry of a new judgment affirming with some modifications, the judgment of the trial court, which it had previously reversed. This final conclusion of the Court of Appeals was dissented from by one of its judges who deemed it to be contrary to certain decisions of this and the appellate courts, wherefore this cause was certified to this court and is before us for determination as provided in the Constitution. There is nothing in the record which discloses that the action of the dissenting judge was not in perfect conformity with the provisions of the Constitution, providing for such action on the part of one of the judges of Courts of Appeals, when he deems an opinion of his brethren to be contrary to the "last previous ruling" or controlling decision of this court. The cause is, therefore, before us for *full determination* on its merits as if it had been brought here by direct appeal from the circuit court.

Neither can that conclusion be escaped by the suggestion in the learned majority opinion that in the particular act of rendering its final judgment the Court of Appeals was shorn of jurisdiction. If that premise were true, the conclusion might logically follow that this court, in virtue of its power of superintendence, might deal with the judgment of the Court of Appeals by an appropriate original writ. But the assumption of the premise is not correct; for the action of the Court of Appeals did not in any respect exceed its "power to act" in cases properly appealed to that court. It may be that the judgment rendered on the motion for re-

hearing was crass error, but the rendition of an erroneous judgment is not a violation of the constitutional power invested in the Courts of Appeals to decide cases; it would be only an erroneous exercise of that power. The error of the majority opinion is that it mistakes the *erroneous* exercise, for the *lack* of jurisdiction. Of course it is not claimed that the instant case did not lie within the strict limits of its appellate jurisdiction, except upon the motion that it fell outside of those limits on account of the erroneous judgment of the Court of Appeals on the motion for rehearing. The case cited in the majority opinion (186 Mo. 225) does not support it. In that case Judge VALLIANT was speaking, on a *review by appeal*, of the incorrect or illegal procedure of the trial court. He did not hold that the trial court had no jurisdiction.

If, as is held in the majority opinion, the Court of Appeals had no right to render the judgment it did render upon consideration of the motion for rehearing without a rehearing in fact, then the party affected by that judgment would have been entitled to file a motion for rehearing and, in default of the sustention of such motion, might have had recourse to any other redress provided by law. No such action was taken, and the cause having reached a final judgment, was certifiable to this court in the manner and for the reasons shown in the order sending it here.

It seems to me that this is a case in which there is a palpable propriety for the language used by Chief Justice MARSHALL in reply to an argument intended to prevent the exercise of jurisdiction by the Supreme Court of the United States in a matter complained of, when he said to the objector, viz.: "That this court does not usurp power is most true; that this court does not shrink from its duty is no less true." This case having been lodged here in the manner prescribed by the Constitution, we should not shrink from the duty imposed on us by the organic law to determine it fully. Hence I dissent from the learned majority opinion.

IN MEMORIAM.

JOHN CHILTON BROWN

WILLIAM MUIR WILLIAMS

In the Supreme Court of Missouri, En Banc, Tuesday, April 10, 1917.

Chief Justice GRAVES: Gentlemen of the Bar, it has been understood that there will be a presentation to the court this morning of portraits of two former members of this bench. We will take that matter up first before the transaction of any business.

JOHN CHILTON BROWN

Chief Justice GRAVES: Judge BROWN having died whilst on the bench, we will be pleased to hear first from the committee having in charge the matter of presenting his portrait.

REMARKS OF HON. HOMER HALL.

May it please the Court:

In accordance with the custom of the Missouri Bar Association, a committee was appointed for the purpose of procuring and presenting to this court a portrait of the late Judge JOHN CHILTON BROWN. The privilege of presenting that portrait to this court this morning has been assigned to me.

The memorial services in honor of Judge BROWN were held one year ago at the convening of the April term of this court, and it is probably not expected that I should dwell at great length upon his life and work as a member of this court. The thirty-three volumes of the reports of the decisions of this court, from the 232nd Missouri to the 265th Missouri, in which his work is recorded, now and increasingly in the years to come will bear proof of his high personal character, his great zeal in his work, his fixed purpose to administer justice and to do right without fear or favor, and of his laudable ambition to set the opinions of this court in clear and concise language and with all brevity consistent with certainty and definiteness.

In the responses that come from the members of the Bench and Bar of this State to the requests for their voluntary contributions to the fund that should be used to procure this portrait, there were so many expressions of the high regard in which Judge BROWN was held that it was gratifying indeed to be numbered among his friends. From

lawyers in all parts of the State there came the expressions of pleasure at the privilege of having an opportunity to participate in the enterprise, and expressions of their high regard for the sterling qualities that characterized Judge BROWN—qualities of heart and of mind that endeared him to those who knew him best.

It was gratifying to know that the members of this court held him in such high regard for his untiring industry, his unswerving fidelity to his convictions and his always-present honesty of purpose. In one expression that came was the statement that if he had lived he would have been numbered among the greatest lawyers that had honored and adorned this bench. And so, with these expressions from the lawyers and the judges of this State it is an honor and a pleasure that I have this morning in presenting to this Honorable Court this portrait of your fellow-member, who died in the discharge of his duties, and who was my personal friend.

Chief Justice GRAVES: Judge FARIS will accept for the court.

RESPONSE BY HON. C. B. FARIS.

Gentlemen of the Bar:—

For more than half of his brief years of service on this bench I sat in Division with Judge JOHN C. BROWN. No man could meet him daily without coming to admire his rugged honesty and his well-balanced sense of right and justice. Early I came to admire him and to be his friend, as he was mine. Hence, I come to perform the gracious task, deputed to me by the Chief Justice, of accepting on the court's part his portrait so generously given us by the Bar of the State.

The outstanding features of Judge BROWN's judicial character were his honesty of purpose, his refined sense of justice and his candid, open mind. Above all else he wanted to be right and to do to all litigants equal and exact justice. So he was not an abject slave to precedent or bald technicality, but if he deemed the ends of justice to require it, he went directly across-lots and over stilted rules to where the right of things abided. In his work he was infinitely careful and painstaking; for the hardships of his youth had robbed him of many advantages and had hedged him about with limitations which he candidly recognized and fought laboriously to surmount. When death touched him and ended his regrettably short service upon this bench, the Bar of the State had come to acclaim him as one who had, as a jurist, won his spurs.

He had no such pride of opinion as caused obstinacy to offend right-doing and when convinced of error he yielded his former views amiably and graciously. I do him only merited justice when I say of him that no man ever sat upon this bench who surpassed him in amiable qualities, or who brought to the unraveling of the intricate and puzzling problems which this bench daily meets, a more conscientious devotion to duty than he unremittngly exercised. This view of duty and his constant strife to overcome the disadvantages arising from his early pioneer environments shortened his life. Had he been content to follow lines of least resistance, as a less conscientious man would have done, he might be living yet; but he overdid himself by

his efforts to be right and in his desire for achievement, and died at a time of life, if we judge by years alone, when the shadows were but barely falling toward the east. We whose pleasure it was here to serve with him, shall long cherish his memory and deem ourselves to have been helped individually and as a bench by our association with this amiable and just judge.

To the Bar whose efforts have furnished us with this portrait, we extend thanks. The portrait shall be hung on the walls of the court room wherein Judge BROWN sat and dispensed justice.

WILLIAM MUIR WILLIAMS

Chief Justice GRAVES: Now the gentlemen of the committee having in charge the presentation of the portrait of Judge WILLIAMS will be heard from.

REMARKS BY HON. FRANK P. SEBREE.

If the Court Please:—

It was expected that Mr. Corum, the chairman of the committee, would be here to present this portrait to the court, but he has been unavoidably detained in the trial of a case. Judge Marshall, another member of the committee, and who was an associate of Judge WILLIAMS upon this tribunal, could not come. However, Mr. Corum and Judge Marshall prepared a short review of the life of Judge WILLIAMS, which Mr. John H. Lucas and I, the other members of the committee, now offer to the court with the portrait. I shall now read this sketch and ask that it be filed and preserved with the records of this court:

"In MEMORIAM OF WILLIAM MUIR WILLIAMS.

"The Missouri Bar Association has appointed the undersigned a committee to present to this court a memorial to Judge WILLIAMS and also his portrait, and representing as we do, not only the Association but also the hosts of his friends from every part of this State, we feel ourselves honored in being selected to perform that sweetly solemn and sad office.

"William Muir Williams ("Billy Williams" as he was affectionately called by his friends and admirers) was born in Boonville, Missouri, on February 4th, 1850, and always resided there. From the time he was six years of age until his death he lived in the same house. He began the practice of the law on the 1st day of February, 1875, and, with the exception of his service on the bench of this court, he remained in active practice thereafter during the whole of his life. On the 16th of December, 1875, he married Miss Jessie Evans of Sedalia, Missouri. Seven children were born of the marriage, of whom six and his widow survive him. He was appointed a judge of the Supreme Court by Governor Stephens, on January 29th, 1898, to fill the vacancy caused by the resignation of Judge SHEPARD BARCLAY, and served on the bench until January 1st, 1899, having refused to stand for election, for personal, family reasons.

"The reports of this court show that his first opinion was rendered February 23rd, 1898, in the case of State ex rel. Savers v. School Dis-

trict, 143 Mo. 89, and his last opinion was on December 23rd, 1898, in the case of Langston v. Southern Electric Railroad, 147 Mo. 457.

"After leaving the bench he resumed the active practice of the law, and his practice extended over nearly the whole State, but particularly in the central parts of the State, and in the large cities of the State. He enjoyed the confidence and respect of every one who knew him, and also of those who knew only of him. No lawyer in the State, especially no lawyer outside of the large cities, had such an extensive and important practice as he enjoyed, and his advice and assistance were sought on nearly all legal matters of importance and doubt by the executive and administrative officers of the State, from the Governor down. He was president of the Missouri Bar Association, a member of the Code Commission appointed by Governor Major, and a member of the State Tax Commission appointed by Governor Dockery. He died at his home in Boonville on September 18, 1916.

"His life was an open book to the world. He was 'a man among men,' a Christian, a faithful and loving husband, a kind parent, a model citizen, an honorable and brilliant lawyer, an upright and able judge, and at all times and under all circumstances a considerate, courteous and conscientious gentleman. Few men have stood as high at the Bar and before the courts. 'His word was his bond,' and he never evaded or shirked an obligation or a duty.

"Those who were associated with him in the trial or decision of cases, as well as those on the opposite side, conceded his legal ability, his quick grasp of the essentials and justice of a cause, and his high sense of right. He was loyal to his clients, tenacious of their rights and untiring in his efforts in their behalf, but he was quick to see the other side of a case, and never strained justice at the expense of the right or truth of a matter.

"Judge WILLIAMS was one of the big men of Missouri, and his State is as proud of him as he was of his State. He died as he lived, honored by all men, loved by his friends, respected by every one and sincerely mourned by the whole community.

"His record as a judge of this court entitles his portrait to a place upon the walls of this Temple of Justice, and we present the same to the court and ask that it be so placed."

If Your Honors please:

The subject of this occasion speaks for himself. Though gone from this life, his works live after him, and his memory will ever remain sweet and wholesome to his friends and associates. In his life the Bench and Bar and the State at large will continue to take peculiar pride. No one who knew Judge WILLIAMS ever for a moment doubted his integrity, or questioned his ability or splendid character. He stood out among the men of the State as unusual. He attained a position at the bar that was admirable, and his career upon the highest court of his State, through his own choice of short duration, marked him as a man who knew the law and loved the justice which only flows from its rightful administration.

I knew him well, and I think I could say of him as strongly as I could of any man I ever knew that his thoughts and purposes were

IN MEMORIAM

v

lofty and honest, and his life a pure and honest life. My earliest recollection of him is as a busy and aggressive young lawyer first getting a foothold in the profession which he so well adorned. Though several years my senior at the bar, I remember him as a young man, filled with that energy and attentiveness to the details of his work that finally aided him so much in the achievement of his great success.

I lived a number of years in an adjoining county to him and frequently saw and was in consultation with him concerning legal controversies. Sometimes I was in cases with him; at times we fought together, and on other occasions we were opposed. Whether with him or against him, one soon felt his forceful presence, and knew that the law of the case, as did also the court before whom he was appearing, was to be brought out in a clear and simple manner and presented by him in the strongest way. At the same time the court and the lawyers knew that he was always a fair antagonist, even if he were a most formidable one.

He found out from the law books what the ablest minds of the country presiding in the courts had determined on the question in hand, and his experience and mind were such that he would grasp the best views that had been enunciated and apply them to his case with full force. He was in all character of litigation. Judge WILLIAMS was not too proud, when it became his duty, to take any kind of case that was honest and had merit, but of course his ability and his time were called out mostly in the larger litigation after he attained such high eminence and country-wide reputation in his profession.

As a citizen Judge WILLIAMS always took part in the affairs of his community, and he soon became known as an interested, public-spirited citizen, and as he grew older his counsel on all matters concerning the public in his vicinity was sought; and, as a neighbor and in his family life he was the very best a man could be in such relations. He was a plain and friendly man, and loved plain people and plain ways. He was conscientious in the uttermost, and believed that truth, alone and unadorned, usually recognized alike by all men, was the soundest basis upon which to rest. He was without ostentation or conceit; he scorned such characteristics in men. No doubt the sentiment of the Good Book appealed to him as about the right estimate: "Seest thou a man wise in his own conceit, there is more hope of a fool than of him."

This portrait is now presented to the court and we ask that it be placed in a conspicuous position upon these walls. The artist has been most true to life, and I think is to be highly commended for his good work, and that all of us are most fortunate in having such an excellent reproduction upon this canvas of the features and expression of the man we all loved so much, and whose cheery presence we shall forever miss in the daily walks of life. But we shall ever be happy when from time to time we shall, as the years go by, return to this chamber in the performance of our duties, be permitted to again look upon this portrait and have our thoughts recur to the noble and useful life of our friend.

REMARKS OF HON. JOHN H. LUCAS.

May it please the Court:—

It must be quite apparent to the Bench as well as to the Bar that there can be but little added to what has been so well expressed by the distinguished jurist and his associate who wrote the resolutions that are asked to be recorded upon the records of the court. And yet I know that you will pardon me if I speak but one word—the promptings of the human heart, the expression of human sympathy and the love of human brotherhood concerning the subject of this morning's consideration.

It was a great ancient that wrote: "What is man that Thou art mindful of him, or the son of man, that Thou visitest him? Thou hast made him a little lower than the angels, and hast crowned him with glory and honor." As we journey in the pathway of life, coming to know, admire, understand, and love each other, this question is presented thus and will continue to be thus presented until the end of time.

What is man? What was the subject of the gifted hand of the artist that has so well portrayed the peculiar features of him of the death of whom we are but for a moment to speak? What kind of man was he? Did he measure up to the requirements of life, or did he run away from its responsibilities? Did he meet the battles of life with a manly heart, as a courageous and strong man, or did he flee away or shun its oppositions and conflicts?

I knew this man forty years ago, when he was a boy. Only two years and four days is the difference between the ages of Judge WILLIAMS and the speaker of this moment. I met him in the court room and became an admirer of him, because his bright, active young mind, his strong, loving heart beat in unison with the higher and nobler aspirations of mankind. He looked upon life as a battlefield—always a struggle for the right, and always the reflection of one's own courageous convictions.

I followed him, at times clasped his hand, and grew to know him better and to love him more. I came in contact with him at the bar when he was struggling for his clients, and stood before him, a member of this splendid assemblage, as he graced this the highest court in this commonwealth, and found him true to every conviction, and faithful in the discharge of every duty. Then I came to understand the ruggedness of his character, the nobility of his soul, and to appreciate him more fully, if possible, than ever before.

So it was, to be a man, and I answer the question—I answer it to-day—that to be a man is worthy of the conception of the ancient—to be crowned a little lower than the angels and with glory and with honor.

What shall I say of WILLIAM MUIR WILLIAMS? I say first that he was rugged in integrity, strong in honor, and incapable of doing a mean or dishonorable act. You always expected you would see him, and have him look you in the face, and you always expected that expression of candor and frankness that was always found in his life.

When he was appointed to this bench, in common with his other friends I rejoiced, because I knew there was coming to this assemblage, the greatest tribunal on earth, save one, a man, with a man's heart, as well as a just judge, and that he would bring to the discharge of the duties, honor and honesty in the administration of justice to this Commonwealth of Missouri. When it came to the time of his retirement, I interviewed Judge WILLIAMS. I thought he should remain on this bench. I wished that he might remain, but he preferred to again engage in the affairs of life; and with all the admiration and respect that one can express of this high and noble bench, I hesitate not to say that his choice was wise, for he came to mingle again with men at the bar, with the character of a great and true lawyer. You cannot conceive of this man ever having dishonored his calling. You cannot conceive of this man having ever betrayed his client. You cannot think of him as being anything except a loyal representative of the highest thoughts of a noble and honorable profession, the profession of the law.

As I look into his face—as the artist has delineated it—I stretch out my hand to grasp his hand as in life. “But no, not now,” and I turn away from this work of art to view the painting of the great Artist of humankind as he takes the flower that He Himself created, and hear him say: “Consider the lilies of the field; they toil not, neither do they spin, yet Solomon in all his glory was not arrayed like one of these.” And as I look into that face I see the hand of the world's greatest Artist, and upon the brow of our brother He has written the words: “A Man.” And that is better than all the honor that can be given—to be a man true to his convictions and to the discharge of every known duty.

Gentlemen, I dare to say in this presence this morning that for a life like this there is no death. I pause for a moment that the impression may rest upon the words of the speaker. Not because they are spoken by one of this hour, but as I look into this face, and consider the Master Artist, the human character, and human experience, human sympathy and human love, I say: “Some day, what day I know not; somewhere, where I know not; sometime, what time I know not, I will grasp the hand of this friend of mine, and walk with him in that somewhere and in that sometime, if I but be as true and faithful to the duties of life as he was true and faithful to them.”

A lawyer went one day to his own mother's room. She was looking out on the western coast, the sun was going down and the shades of evening were cast about, and the lawyer said: “I will not disturb this mother of mine as she observes the glory of the setting sun.” There was a little stand between the window and the lawyer, and upon it was an open book. It was thumb-marked and tear-stained. He picked up the book and read: “Though he were dead, yet shall he live again, and he that liveth and believeth shall never die.” Taking one step, he felt the warm embrace of a mother's arm, a mother's kiss placed upon his lips, and he said: “Goodbye, I will see you again,” and went off in the discharge of the duties and obligations of life, never to look into her

face again except to see it white in what is called death. But all the men on earth, and all the demons of despair, could never convince that lawyer that his mother is dead. He goes into the chamber where he saw her last, expecting to see her again in the flesh. He goes away, knowing that somewhere, sometime—I know not where, I know not when, I will walk in the sunlight of eternal life, I will be true and faithful to the splendid example that was set by this mother of mine, and be true and faithful to the splendid heroism and achievements that she has left in this life.

Gentlemen, these are but the promptings of the human heart. Not prepared, not thought out; but I am looking into the faces of this splendid tribunal, for whom none has more respect, thinking of the strong, splendid character that has passed on before, and I am daring to declare that the time will come when we will not say "Good night," but "Good morning" to our friend and brother, WILLIAM MUIR WILLIAMS.

RESOLUTIONS OF BOONVILLE, MISSOURI, BAR.

"Whereas, the hand of death has taken from our midst our brother, Judge WILLIAM MUIR WILLIAMS, and

"Whereas, we desire to express and to perpetuate in the records of our courts a memorial of our love and esteem for our departed brother; therefore

"Be It Resolved by the members of the Bar of Boonville, that we deplore the loss sustained by us and by the courts and the people of our community and State, in the untimely death of this distinguished lawyer, whose conspicuous ability, displayed during a long course of active practice and as a jurist upon the bench of the Supreme Court of Missouri, had placed him in the front rank of his profession.

"Resolved, that we recognize and point with pride to the professional eminence of Judge WILLIAMS; to his unfailing loyalty to the highest ethics of his calling; to his ever-ready and kindly helpfulness to his professional associates; to the unblemished purity of his public and private life, and his unstained Christian character; to his generous and active public spirit in matters affecting the welfare of the community and State; and to his devoted and happy home life.

"Resolved, that in his death our bar, as well as our community and State, have sustained an irreparable loss; that his family have our deep and heartfelt sympathy, and that we shall ever cherish his successful and honorable record as a priceless heritage left to the bar, which he so long and so highly adorned."

Chief Justice GRAVES: Judge WALKER, a boyhood friend of Judge WILLIAMS, will respond for the court.

REMARKS OF HON. R. F. WALKER.

Nothing is more uplifting than the lesson to be learned from a life rightly lived. It suited the purposes of indulgent nature that WILLIAM MUIR WILLIAMS, our beloved friend and brother lawyer, should have been permitted to bless us with his presence for almost the full

span of years allotted to man by the Psalmist. It has been our good fortune and the source of much of our happiness to have known him and to have enjoyed his confidence and friendship during many of these years. We knew him in his timid and reserved young manhood and in his self-reliant and well ordered prime, on down through the after years of success and honor until "death's finger touched him and he slept."

There is no need in reviewing his life to invoke the old Latin maxim in regard to the nature of speeches concerning the dead, or to seek to cover any part of his career with the mantle of charity, which like the magic tapestry in the Persian tale is ample when kindly touched to cover all defects. His record is best read in the white light of truth. Thus read, leaving nothing to inference, banishing equivocation and clothing our comment only in the plain and wholesome words of our native speech, it may be said of him, as was said of the illustrious General Robert E. Lee, that "no record can ever leap to light that will tarnish his name."

Void of reproach as was his personal life, his professional career was equally free from blemish; and it may well serve to arouse the uplifting emulous activity of every member of our profession, except those who regard the law as only a means of getting money and dwarf their souls and sacrifice their honor in the service of some sordid interest. Measured by results, and there is no fairer standard, Judge WILLIAMS'S professional record is most satisfying. Tried in every forum, in none was he found wanting. Unremitting industry characterized his every effort. Whether the matter entrusted to his care was of minor importance or great magnitude, in the humble justice's court or the highest tribunal, his fidelity to his client's cause was the same; and his mastery of the facts and the law rendered his presentation of a case a source of satisfaction to the courts and oftentimes won for him the admiration of opposing counsel. His practice was until the end more varied than that of any other lawyer I have known. During the last twenty years of his life a week did not elapse during term time when he did not appear in one or more of the courts to participate in the trial or hearing upon appeal of important cases. Most frequent during this period have been his appearances in the State and United States Supreme Courts and Courts of Appeals. He was somewhat anomalously a lawyer's lawyer. During the last decade especially, he has oftener been employed by counsel than by the litigants themselves. No higher tribute can be paid to professional merit. He was throughout his long career the very antithesis of the specialist. He conducted with like seeming skill and mastery of the subject, civil and criminal cases, proceedings in equity or matters involving the multi-form and intricate questions of corporation law; and whether in the trial or appellate courts of State or Federal jurisdiction evinced an easy familiarity with phases of procedure which even to many industrious compilers of precedents are still unwritten law. Loving the law, he gave it no divided allegiance. My personal regard for him might lead me, despite the high standard of his individual and professional life, to speak of him in terms savoring of adulation. Subjecting, however, my estimate to the acid test of others' opinions of his merits, I

do not feel that I exaggerate his personal virtues or place too high an estimate upon his professional ability. Nature, it is true, conferred upon him mental gifts and a moral fiber above the average. These, however, would not have sufficed to have enabled him to become one of the best equipped and well rounded lawyers we have known, had he not supplemented nature's gifts with years of patient and persistent toil. I have known many lawyers who have risen high in the profession and who have been remarkable for the extent of their learning along particular lines; but I have never known one whose mind compassed a wider field of jurisprudence than that of Judge WILLIAMS. But he was in no sense a genius and manifested no transcendent mental traits and was as simple and unassuming in his intercourse with other lawyers, notwithstanding his great knowledge of the law, as the modest tyro who, conscious of an ever widening horizon, realizes more and more with his increasing knowledge, how little he knows compared with what may be known. This modest estimate which Judge WILLIAMS unquestionably placed upon himself was, I think, one of the moving causes and prime reasons, paradoxical as it may sound, of his almost unparalleled industry. Its abundant harvest in his case we are all familiar with.

For a brief period Judge WILLIAMS was, under the appointment of the Governor, one of the judges of this court. His opinions are remarkable for brevity and clearness of statement, two requisites of prime importance in the rulings of courts of last resort. They exhibit no blind following of precedent in which the letter killeth, no straining after technicalities, resulting oftentimes in a denial of substantial justice. When his term expired he declined to stand for election, although insistently requested so to do by many of the best lawyers in the State. His purpose in "going back to the practice," he told me, was twofold: First, he was averse to participating in such a campaign as is necessary to secure an election to a judicial position; and, second, he preferred the active labor of the practice of the law to the grinding toil and hermit-like life of the appellate judge.

When a mind rich in its fruitage as Judge WILLIAMS's was, turns to clay and its splendid activities are forever stilled, we are prone to feel, in spite of the teachings of our childhood and the faith founded thereon, that there is something lacking in the economy of nature that will permit such a loss. Aside, therefore, from the personal loss we have sustained in the death of Judge WILLIAMS, we cannot but regret that, however much he may have striven to transfer his splendid equipment to others, it was beyond the range of possibility. Thus it has ever been that of the ripened efforts of those who have been most helpful to humanity in any relation of life, nothing remains after death but *dissecta membra*. With the profession of the law this is particularly true. The effect of the lawyer's labors are most ephemeral. His accumulated learning and ripened experience descend at his death upon no one as a helpful and protecting mantle. Oftentimes he is remembered, even if lovingly, more for his foibles than his mental or moral worth. His learning, whether made manifest in the trial or appellate courts, is dissipated into thin air upon the rendition of the judgment

and whatever record has been made of it is hidden away in briefs which nobody reads. If he aspires to authorship it serves often but to lessen the estimate his brethren place upon him as a lawyer, and, wedded as we are, under the common law system, to precedent, he who dares to advocate reform in the law is dubbed a doctrinaire rather than an aid to the profession. If a judge, he fares no better and leaves no more lasting impress upon his fellows. His most carefully prepared opinions may occasion momentary comment when the questions they determine are current, but they are soon immured in a tomb more obscure than that of him "who died at Azim," to-wit, the law reports. There they sleep the sleep that knows no waking, disturbed only by the occasional frantic efforts of some frenzied lawyer hunting for a precedent.

However ephemeral may be our best directed efforts, Judge WILLIAMS's memory is graven on our hearts and during this generation at least it will be lovingly treasured, not alone for his devotion to and preeminence in our profession, but for his pure and noble personal life, which we trust may prove a pole star to guide us to a realm of better thoughts and a higher plane of living. Never has the couplet of Shirley been more appropriately applied than to Judge WILLIAMS's memory, that

"Only the actions of the just
Smell sweet and blossom in their dust."

Chief Justice GRAVES: Gentlemen of the respective committees: There remains but the simple duty of myself as Chief Justice of the court, to announce to you that by order of the court these two splendid portraits will be hung upon the walls of our respective court rooms—Judge BROWN's in Division No. Two, in which he so patiently served, and Judge WILLIAMS's in Division No. One, where he likewise patiently served; and the resolutions and addresses are ordered to be published in the bound volumes of our Reports.

INDEX.

ABATEMENT.

1. **Will Contest: Death of Contestants: Revivor.** When a will contest has once been instituted by persons who have a direct pecuniary interest in the final determination of the question of whether or not there is a will, the burden of proving the will then rests upon the proponents, and the contest must go forward to a final adjudication; and if the contestants die, the action does not abate, and there is no absolute necessity of a revivor in the name of those who have a financial interest in the result, although upon proper application they may be substituted as contestants, but the administrators of the contestants are not proper parties. *Braeuel v. Reuther*, 603.
2. ———: ———: ———: **Administrator.** Upon the death of the contestants of a will, their administrators should not be substituted as parties. An executor or administrator is not, under the statutes, an interested party to a will contest, either active or nominal. The statute limits the right of action to "persons interested in the probate of wills," and an executor or administrator is not such a person. *Ib.*

ABSTRACT.

1. **Negligence: Vigilant Watch Ordinance: Not in Abstract.** Whether or not an instruction permits a recovery against a street railway company if the conductor of the car failed to keep a vigilant watch for vehicles on the track, in violation of a city ordinance, and is for that reason erroneous, or whether or not the ordinance applies only to motormen, will not be decided, if the ordinance is not preserved in the printed abstract. Courts cannot take judicial notice of municipal ordinances, however great the municipality. *Peterson v. United Rys.*, 67.
2. **Appeal: No Motion or Bill.** If the abstract of the record proper fails to show that a motion for a new trial and a bill of exceptions were filed in the trial court, only such assigned errors as may appear in the record proper can be reviewed on appeal—although the abstract contains what purports to be a bill of exceptions in which the filing of the motion and bill is recited. *Wilson v. Reed*, 400.

ACCOUNTING.

Prayer and Relief: Land on an Accounting. A supplemental bill whereby plaintiff seeks to have vested in him the title of certain land, which has been conveyed since suit was begun, and in which he prays that, if the court should find that the present record owner is a purchaser in good faith and for value, so that the plaintiff shall have no right of redemption against him, the original defendant shall be decreed to account for and pay over to plaintiff the proceeds of the property so conveyed by him since the filing of the original petition, is sufficient to entitle plaintiff to an accounting for the proceeds in the event the court could not give him the land. *Marston v. Catterlin*, 5.

270 Mo.]

(705)

270 Mo.—45.

ACTIONS.

1. **Partition: Subject to Life Estate: Agreement Not to Divide.** Where three daughters to whom a mother conveyed land subject to a life estate reserved for herself, at her request, entered into a written agreement not to "ask for a division or partition," the agreement "to continue in force and be binding on each party hereto while they live," the heirs of one of the daughters who has died are entitled to have partition, subject to the life estate of the mother. The agreement should not, without good reason, be construed to bind the survivors to continue the cotenancy with the heirs of the deceased. *Flournoy v. Kirkman*, 1.
2. **Certiorari: Quashing Judgment in Like Cases.** Where suit was brought on policies of fire insurance against several insurance companies, and appeals were taken by all the defendants from judgments in favor of plaintiff to the Court of Appeals, and in that court the cases were submitted together, the questions involved being the same in all, and that court rendered an opinion in only one of them, disposing of the others by memorandum opinions referring for their rulings to the opinion in the one case, and that opinion is quashed on *certiorari* as being in conflict with the prior rulings of this court, the judgments in the other cases will also be quashed upon *certiorari*. *State ex rel. v. Ellison*, 47.
3. **Law of Case: Different Suit.** Whether or not it be true that the law as declared by the court on one appeal continues to be law of that case upon a subsequent appeal, the rule has no application to a new and separate action. *State ex rel. v. Eastin*, 193.
4. ———: ———: **Mandamus: Demurrer Sustained.** If it no where appears in the alternative writ that a suit by mandamus has previously been brought, and the facts of a former suit are not set forth therein, an appeal from the ruling of the trial court sustaining a demurrer to the alternative writ is not a second appeal, and hence it cannot be held that the rulings on appeal in a former mandamus case have become the law of this second suit. *Ib.*
5. **Will Contest: Death of Contestants: Revivor: Abatement.** When a will contest has once been instituted by persons who have a direct pecuniary interest in the final determination of the question of whether or not there is a will, the burden of proving the will then rests upon the proponents, and the contest must go forward to a final adjudication; and if the contestants die, the action does not abate, and there is no absolute necessity of a revivor in the name of those who have a financial interest in the result, although upon proper application they may be substituted as contestants, but the administrators of the contestants are not proper parties. *Braeuel v. Reuther*, 603.
6. ———: ———: ———: **Administrator.** Upon the death of the contestants of a will, their administrators should not be substituted as parties. An executor or administrator is not, under the statutes, an interested party to a will contest, either active or nominal. The statute limits the right of action to "persons interested in the probate of wills," and an executor or administrator is not such a person. *Ib.*

ADMINISTRATION.

Will Contest: Death of Contestants: Substitution of Administrator as Party. Upon the death of the contestants of a will, their administrators should not be substituted as parties. An executor or administrator is not, under the statutes, an interested party to a will contest, either active or nominal. The statute limits the right of action to "persons interested in the probate of wills,"

ADMINISTRATION—Continued.

and an executor or administrator is not such a person. *Brauel v. Reuther*, 603.

AFFIDAVIT.

1. **Divorce: Verification of Petition: Jurisdiction.** Unless the petition for divorce is accompanied by the affidavit required by the statute, the court acquires no jurisdiction of the case. *Robertson v. Robertson*, 137.
2. ———: ———: **Unsigned Affidavit.** An unsigned affidavit is no affidavit at all, and where the statute requires an affidavit to accompany the petition, the court does not obtain jurisdiction unless the accompanying affidavit is signed by the proper party. And a divorce decree entered by default upon a petition to which an unsigned affidavit is attached, is void; and especially should an unsigned affidavit in a divorce case be held to be no affidavit at all, because many of the statements which the statute requires the affidavit to include can be known by the petitioner alone, and courts are too often imposed upon in such cases. *Ib.*

APPEALS.

1. **Appellate Practice: Certification from Court of Appeals.** A case certified to the Supreme Court by a Court of Appeals on the ground that its decision therein is in conflict with a decision of another Court of Appeals in another case, stands for final decision and judgment, just as if it had been appealed directly to the Supreme Court from the circuit court. *State ex rel. v. Turner*, 49.
2. **Practice in Supreme Court: Certification from Court of Appeals.** A case certified from a Court of Appeals, upon certification that the majority opinion therein conflicts with certain cases of the Supreme Court is for full review. *Peterson v. United Railways*, 67.
3. **Appellate Practice: Inadvertent Admission in Brief.** An admission in the record by counsel for appellant which is contradictory of the whole theory of his case and of his brief and argument based upon a contrary fact, will be considered on appeal as having been inadvertently made, or as a clerical error in the writing or printing of the record. *Lumber Co. v. Ripley County*, 121.
4. **Practice in Supreme Court: Certification from Court of Appeals.** When a case is certified from a Court of Appeals to the Supreme Court, upon the dissent and certification of one of its judges, all questions involved are for consideration in the Supreme Court, just as if the case was one appealable to this court in the first instance. *Robertson v. Robertson*, 137.
5. **Drainage District.** The right of appeal from a decree incorporating any municipal corporation is limited. *In re Drainage Dist.*, 157.
6. ———: **Right to Appeal: For What Things Authorized.** Notwithstanding the statute (Laws 1913, sec. 116, p. 241) says that "any person may appeal from the judgment of the court" in a drainage district case, the subsequent words of the statute limit the inquiry of the appellate court (1) to the compensation allowed for property taken and (2) to the damages allowed for property prejudicially affected by the improvement. It is the taking or damaging of property, and not the incorporation of the district, that affects the owner's rights and authorizes his appeal. *Ib.*

APPEALS—Continued.

7. ———: ———: **Incorporation.** Objectors are not entitled to an appeal from the judgment of the circuit court incorporating a drainage district, if the court has jurisdiction of the subject-matter. In re Drainage Dist., 157.
8. ———: ———: **Incorporated for Unauthorized Purpose.** There is a wide difference between a drainage district and a levee district; and while the question of whether a district organized as a drainage district was in fact a levee district may be properly raised on an appeal from a decree incorporating it, since lack of jurisdiction of the subject-matter may be shown in any suit involving it, yet the better practice is to raise the question of legality of incorporation in the suit on the tax bills. [Distinguishing Birmingham Drainage District v. Milwaukee Ry. Co., 266 Mo. 60, and Elsberry Drainage District v. Harris, 267 Mo. 139.] Ib.
9. ———: ———: **General Statute Inapplicable.** The general statute governing appeals does not apply to a drainage district case. The proceeding in such case is purely statutory, and there can be no appeal unless the drainage act, which is a complete code unto itself, authorizes it. Ib.
10. ———: ———: **Why Appeal from Judgment of Incorporation is Not Allowed.** The decree incorporating a drainage district is preliminary, informal, tentative and conditional and not a final decree adjudicating any one's rights from which an appeal will lie. Ib.
11. **Law of Case: Different Suit.** Whether or not it be true that the law as declared by the court on one appeal continues to be law of that case upon a subsequent appeal, the rule has no application to a new and separate action. State ex rel. v. Eastin, 193.
12. ———: ———: **Mandamus: Demurrer Sustained.** If it no where appears in the alternative writ that a suit by mandamus has previously been brought, and the facts of a former suit are not set forth therein, an appeal from the ruling of the trial court sustaining a demurrer to the alternative writ is not a second appeal, and hence it cannot be held that the rulings on appeal in a former mandamus case have become the law of this second suit. Ib.
13. **Facts of Former Suit: Judicial Notice.** The Supreme Court takes notice of a former appeal and the record thereof, but does not notice the facts and records in one action when called upon to rule another and separate action. Ib.
14. **Partition: Severance and Subsequent Sale of Homestead: Bill of Exceptions.** Where the proceedings in a partition suit have been regular up to the time the report of the commissioners appointed to admeasure and set off the homestead has been filed, the court cannot thereafter order the homestead sold and the value thereof placed in the hands of a trustee for the use of the widow and minors; and if such an order is embodied in a judgment subsequently rendered ordering distribution, it as well as the judgment are for review on appeal, as matters of record proper, and a bill of exceptions is not necessary. Dalton v. Simpson, 287.
15. **Evidence: Objection: Raised First on Appeal.** An objection that a will, the common source of title, was not shown to have been admitted to probate, comes too late if made for the first time in appellant's brief. Schneider v. Kloepple, 389.
16. **No Motion or Bill.** If the abstract of the record proper fails to show that a motion for a new trial and a bill of exceptions were

APPEALS—Continued.

- filed in the trial court, only such assigned errors as may appear in the record proper can be reviewed on appeal—although the abstract contains what purports to be a bill of exceptions in which the filing of the motion and bill is recited. *Wilson v. Reed*, 400.
17. **Writ of Error: New Suit.** A writ of error is not, like an appeal, to be considered as a continuation of the original action, but as a new action, which must contain, on its face, the evidence of the right of the plaintiff in error to a review. *Trust Co. v. Traction Co.*, 487.
 18. ———: **Specification of Parties.** Although the writ of error is a writ of right, that right differs in no respect from the absolute right to bring an action under the Code of Civil Procedure, which can only be done by petition, specifying, among other things, the names of the parties to the action. So in the writ of error, the plaintiff must be equally explicit as to the identity of the judgment he attacks and those against whom he seeks a remedy. *Ib.*
 19. ———: ———: **Real Party Not Named.** If neither the name of the party with whom alone is the controversy, nor his judgment by any title which identifies it, is mentioned in the writ, and he does not come within any description contained in it by which he can be identified as the adversary of the plaintiff in error, the writ must be quashed. *Ib.*
 20. **Judgment: Effect of Appeal and Supersedeas.** An appeal does not stay a judgment, or stay the issuance of execution thereon. It is the *supersedeas* statute which, upon condition, stays a judgment pending an appeal upon the appellant's making and filing the requisite bond; and if a judgment be not suspended or stayed by a *supersedeas* bond, it continues, pending an appeal, in full force and vigor, and execution may issue. *Kansas City v. Field*, 500.
 21. **Motion to Strike Out Answer: No Exception.** An assignment that the trial court erred in overruling contestants' motion to strike out proponents' amended answer on the ground that it contradicted the original answer, cannot be reviewed on appeal unless an exception was saved to the ruling and the exception and the motion itself were preserved in a bill of exceptions. *Bingaman v. Hannah*, 611.
 22. **Bill of Exceptions: No Order of Court.** It is not a necessary prerequisite, in a case arising since the passage of the Act of 1911, to the right to file a bill of exceptions, that the trial court should make an order during the term at which exceptions were taken granting leave to file the bill thereafter. If the exceptions which comprise the bill were taken at the May term, 1912, and no entry or order was made at that term granting leave to file the bill thereafter, a bill presented, allowed and filed at the November term, 1914, being prior to the time plaintiffs in error were required to serve their abstract, will be considered for purposes of review. *State ex inf. v. Sweaney*, 685.
 23. **Constitutional Question: Untimely Raised.** A constitutional question is neither timely nor otherwise sufficiently raised by an assignment in the motion in arrest that "the facts stated in said information do not constitute a charge or offense under the Constitution and laws of this State" and by an allegation in the assignment of errors that the statute in question is in violation of section 8 of article 1 of the Constitution of the United States. *State v. Swift & Co.*, 694.

APPEALS—Continued.

24. ———: **Assignment Must Be Specific.** To raise a constitutional question the particular provision of the Constitution alleged to be violated must be pointed out. *State v. Swift & Co.*, 694.
25. ———: **Previously Decided.** A plea of unconstitutionality will not confer jurisdiction where the Supreme Court has theretofore held the statute in question valid. *Ib.*
26. ———: **Transfer to Court of Appeals.** If the constitutional question was neither timely nor otherwise sufficiently raised and the statute under which defendant was convicted of a misdemeanor has previously been adjudged to be constitutional, the case will be transferred to the proper Court of Appeals for final determination. *Ib.*
27. **Appellate Practice: Rehearing Granted: Immediate Decision Without Rehearing.** After a Court of Appeals has granted a motion for a rehearing, it cannot at the same time and immediately without a rehearing and without a re-submission, render judgment. When a rehearing is allowed the case stands for re-argument and re-submission, and a judgment rendered without re-submission is *coram non judice* and void.
- Held* by BOND, J., dissenting, that the Court of Appeals has jurisdiction of the cause, and its judgment was at its worst a mere erroneous exercise of that jurisdiction, and in no sense a violation of the constitutional power vested in it to decide cases; and one of the judges of that court, deeming the judgment to be in conflict with certain designated decisions of the Supreme Court and of another court of appeals and having for that reason caused the case to be certified to the Supreme Court, that certification gave this court jurisdiction of the whole case, and it is before the Supreme Court for determination on the merits, just as if it had been brought to it by direct appeal from the circuit court, in total disregard of the error by which the judgment was reached in the Court of Appeals. *Paving Co. v. Realty & Imp. Co.*, 698.

APPOINTMENT.

After Election. The fact that the Governor failed to appoint some one to fill the vacancy in the office of Collector of Revenue, which had existed for sometime, until after the election of respondent to fill the unexpired term, did not authorize respondent to assume the duties of the office. The statute does not declare when the appointive power shall be exercised, and he may therefore exercise it at any time before the expiration of the time the statute says his appointee shall occupy the office. Besides, respondent's title to the office comes through and by virtue of the rights incident to his election, and not through any default or delayed action of the Governor. *State ex inf. v. Koeln*, 174.

ATTACHMENT.

Abatement: Entrance of Appearance: Special Tax Bills. The judgment should not sustain an attachment sued out in the action on a special tax bill on the ground of non-residence, or adjudge the costs of the attachment against the defendant, if he enters his personal appearance to the action. *Const. Co. v. Realty Co.*, 450.

BENEFIT ASSESSMENTS.

1. **Drainage District: Legality of Incorporation: Raised in Suit on Tax Bill.** Whether a drainage district has been legally incorporated or

BENEFIT ASSESSMENTS—Continued.

not can be raised in a suit on the tax bills. In re Drainage District, 157.

2. **Sewer: Taxation of Agricultural Lands.** Notwithstanding plaintiff's lands are used largely for agricultural and garden purposes, have not been platted into blocks and lots, constitute 160 of the 1600 acres in the sewer district, and the tax against them to construct the main sewer will be \$36 per acre, and if constructed no laterals from it through the lands are at present contemplated, yet if there are 3500 inhabitants residing within the district, there are churches, schools and hospitals, the sewer is to be constructed along the course of natural drainage, the district is now totally without sewers and there is no other feasible method for draining the lands included therein, and these agricultural lands within the city limits when laterals are constructed can be drained by the main sewer, its construction will not be enjoined on the ground that the ordinances authorizing it are unreasonable and oppressive. *Whitsett v. Carthage*, 269.
3. ———: ———: **Public Health.** All persons hold their property subject to the laws providing for the public health, safety, morals and general welfare; and if a main sewer is necessary for the public health of a large portion of a city, and will benefit not only the parts densely populated but in time the agricultural lands included in the district also, the owners of such lands cannot enjoin its construction on the theory that it is not necessary for the present enjoyment and use of those lands, they cannot be immediately served by it, and the costs to be taxed against them will be very heavy, possibly confiscatory. *Ib.*
4. ———: **Benefits.** It is not only benefits to real estate that are to be considered in sewer construction. Primarily the benefits are conferred on all the people of a district, through sanitation and health conservation, and secondarily on the real estate taxed with the cost, in that it is made more desirable for business and residential purposes and increased in value. *Ib.*
5. ———: ———: **Laterals.** The owners of land not reached by lateral sewers are benefited by laterals which connect other improved lands in the district with the main sewer, since they serve to drain away the refuse that would endanger the public health. *Ib.*
6. ———: **Laterals: Time of Construction.** The law does not require all lateral sewers of a drainage district to be constructed at the same time. They may be constructed as the necessity for them arises, and not before. *Ib.*
7. ———: **Taxes in Proportion to Benefits.** The fact that the benefits to lands taxed with the costs of a sewer do not exactly equal such costs will not invalidate the construction or the tax bills. Approximate equality is all the law requires. *Ib.*
8. **Special Tax Bill: Sewer District: Description by Parcels Instead of by Entire Enclosure.** Where the charter provided for the issuance of a "special tax bill against each lot or parcel of ground in the joint sewer district, giving the name of the owner," and declared that "the word 'lot' as used in this section shall be held to mean the lots as shown by recorded plats of additions or subdivisions, but if . . . the owners of property have disregarded the lines of lots as platted, and have treated two or more lots or fractions thereof as one lot, then the whole parcel of ground or lots so treated as one, shall be regarded as a lot," tax bills which

BENEFIT ASSESSMENTS—Continued.

describe the property by subdivisions and boundaries according to the recorded plat are not void, although the area (Semple Place) covered by the plat has been sold as a body under a prior deed of trust, if there is substantial evidence that there were "parcels of ground" substantially commensurate with the subdivisions outlined in the recorded plat and that they had been so treated by the owners; and there being substantial evidence to support the finding of the trial court on the question, it is not for review on appeal. *Construction Co. v. Realty Co.*, 450.

9. ———: **Notice of Suit: Filing With Comptroller.** Sections 9848 and 9849, Revised Statutes 1909, requiring notice of suit brought on a special tax bill to be filed within ten days with the city comptroller, and declaring that unless such notice is filed and suit is brought within two years the lien shall cease, do not condition the right to sue, or to maintain the suit after its institution, upon the filing of said notice. All legitimate objects of the notice are subserved if it is filed before the trial and the expiration of the lien. *Ib.*
10. **Judgment: Limitations: Special Tax Bill: City Charter: Paramount Statute.** And though the judgment was based upon a benefit assessed against a lot as its share of the cost of a public improvement and the city charter says such judgment shall be a lien until the assessment is paid, such charter provision must yield to the paramount authority of the State statute, and execution cannot issue after the period of ten years mentioned in the statute has expired. *Kansas City v. Field*, 500.
11. ———: ———: **Matter of General Policy.** Whether an execution can be issued upon an unrevived judgment after ten years is a matter pertaining to the general laws and policy of the State, and not one relating strictly to municipal affairs or coming under municipal control. And although the judgment grows out of an assessment of the costs of a public park against lots within the benefit district, and the city charter prescribes as the method of enforcing such assessment the judgment of a court of general jurisdiction, yet that judgment, like any other of such a court, is controlled by the statute, and an execution based on it must follow the course of other executions issuing out of such courts. *Ib.*

BILL OF EXCEPTIONS.

1. **Circuit Clerk: Negligence in Filing Bill of Exceptions: Damages.** To justify a recovery of damages against a circuit clerk and his bondsmen for his failure to properly file a bill of exceptions delivered to him by the losing party who has appealed from a judgment rendered against him in the circuit court, such losing party must show actionable negligence on the part of the clerk and consequent damages. *State ex rel. v. Turner*, 49.
2. ———: **Filing Bill of Exceptions.** When the circuit clerk accepted and deposited with other papers in the cause in his office the bill of exceptions delivered to him by appellant to be filed, the act of filing was complete, although he failed to subscribe on the bill itself any written notation of the act of filing done by him. Such notation would have been full evidence of the fact recited by it, but the fact of filing existed independently of that particular method of proving it. *Ib.*
3. ———: ———: **Damages for Failure to Obtain Reversal.** Notwithstanding the fact that the Court of Appeals, to which defendant appealed from a judgment rendered against it in the circuit

BILL OF EXCEPTIONS—Continued.

court, held that no bill of exceptions had been filed and affirmed the judgment upon a consideration of the record proper only, and defendant afterwards paid that judgment, defendant cannot recover in a suit for damages against the circuit clerk and his bondsmen for negligently failing to file such bill of exceptions, if the bill was delivered to the clerk within the time fixed by the order of the court and he accepted it and placed it among the papers in the cause in his office, for the act of filing was complete, although the clerk did not mark it filed and made no entry on the court record showing it had been filed. [Approving State ex rel. Railroad v. Turner, 177 Mo. App. 1. c. 464, and disapproving Callier v. Railroad, 158 Mo. App. 249.]

Held, by GRAVES, C. J., dissenting, with whom WALKER and WOODSON, JJ., concur, that the general rule that the deposit of a bill of exceptions with the circuit clerk and an acceptance thereof by him is a filing of such bill, is a rule which he cannot invoke, but is for the protection of the party depositing the bill, established in order that such party may not be injured by the negligence of the clerk; that it was negligence of the clerk not to mark the bill filed, and as he did not do that, or make any entry on the court records showing its filing, the record could not be corrected by a *nunc pro tunc* entry, and the Court of Appeals was authorized in holding the record showed no filing of the bill; and the clerk should be held liable for damages to the extent of the judgment which defendant has been compelled to pay because of his neglect of an imposed duty. *Ib.*

4. **Change in Judge.** A bill of exceptions agreed to by both parties, and signed by the circuit judge who tried the case, after the county in which the case was tried had been detached from his circuit and added to another, will be considered on appeal. [Refusing to follow State ex rel. v. Flick, 179 Mo. App. 236.] State ex rel. v. Railroad, 251.
5. **Circuit Judge: State Officer.** The office of circuit judge is a State and in no sense a local office, and the judge as such may exercise his judicial functions in proper cases in any county. His powers, in whatever county exercised, rest upon his election or appointment and qualification by his oath of office; and whenever in the performance of his official duties, he enters upon the trial of a case, he acts within the limits of his official authority, which continues until the duty is performed or he goes out of office. If he tried the case and is still circuit judge he can settle and approve the bill of exceptions, although the county in which the case was tried is, by legislative enactment, no longer a part of his circuit. *Ib.*
6. **Partition: Severance and Subsequent Sale of Homestead.** Where the proceedings in a partition suit have been regular up to the time the report of the commissioners appointed to admeasure and set off the homestead has been filed, the court cannot thereafter order the homestead sold and the value thereof placed in the hands of a trustee for the use of the widow and minors; and if such an order is embodied in a judgment subsequently rendered ordering distribution, it as well as the judgment are for review on appeal, as matters of record proper, and a bill of exceptions is not necessary. Dalton v. Simpson, 287.
7. **Appeal: No Motion or Bill.** If the abstract of the record proper fails to show that a motion for a new trial and a bill of exceptions were filed in the trial court, only such assigned errors as may ap-

INDEX.

712

BENEFIT ASSESSMENTS—Continued.

describe the property by subdivisions and boundaries according to the recorded plat are not void, although the area (Sample Place) covered by the plat has been sold as a body under a prior deed of trust, if there is substantial evidence that there were "parcels of ground" substantially commensurate with the subdivisions outlined in the recorded plat and that they had been so treated by the owners; and there being substantial evidence to support the finding of the trial court on the question, it is not for review on appeal. Construction Co. v. Realty Co., 450.

9. —: Notice of Suit: Filing With Comptroller. Sections 9848 and 9849, Revised Statutes 1909, requiring notice of suit brought on a special tax bill to be filed within ten days with the city comptroller, and declaring that unless such notice is filed and suit is brought within two years the lien shall cease, do not condition the right to sue, or to maintain the suit after its institution, upon the filing of said notice. All legitimate objects of the notice are subserved if it is filed before the trial and the expiration of the lien. Ib.
10. Judgment: Limitations: Special Tax Bill: City Charter: Paramount Statute. And though the judgment was based upon a benefit assessed against a lot as its share of the cost of a public improvement and the city charter says such judgment shall be a lien until the assessment is paid, such charter provision must yield to the paramount authority of the State statute, and execution cannot issue after the period of ten years mentioned in the statute has expired. Kansas City v. Field, 500.
11. —: —: Matter of General Policy. Whether an execution can be issued upon an unrevived judgment after ten years is a matter pertaining to the general laws and policy of the State, and not one relating strictly to municipal affairs or coming under municipal control. And although the judgment grows out of an assessment of the costs of a public park against lots within the benefit district, and the city charter prescribes as the method of enforcement such assessment of a court of general jurisdiction, yet that judgment, like any other of such a court, is controlled by the statute, and an execution based on it must follow the course of other executions issuing out of such courts. Ib.

BILL OF EXCEPTIONS.

1. Circuit Clerk: Negligence in Filing Bill of Exceptions: ages. To justify a recovery of damages against a circuit clerk his bondsmen for his failure to properly file a bill of exceptions delivered to him by the losing party who has appealed judgment rendered against him in the circuit court, party must show actionable negligence on the part of the clerk and consequent damages. State ex rel. v. Turner, 1.
2. —: Filing Bill of Exceptions. When the circuit clerk and deposited with other papers by appellant to be filed was complete, although he failed to submit himself any written notation of the act of filing done but the fact of filing of the evidence of the method of proving it. full independent method of proving it. existed.
3. —: —: Damages. Ib. notwithstanding the fact that appellant appealed from the judgment.

that decision will be upheld.

als. The Court of Appeals cannot reverse the Supreme Court of an instruction by merely saying it is harmless.

on Appeal. An objection that a devise was not shown to have been adopted if made for the first time in appeal, 389.

is reasonable and natural that a testator, should devise his real estate to be pleased during her life, the result of the benevolent association of the church

ed: Intention. Although the words of a devise, in the absence of words showing the language employed shows the latter case, the lesser estate

of Disposal: Remainder: Intention. The real estate I bequeath to my wife for life, and at her death what remains to the St. Joseph Catholic Orphan Asylum in St. Louis, Missouri. The estate in fee was not devised to Anna by language as clear and unambiguous as to create a remainder; that is, a life estate, the remainder to vest in the

Erroneous Name. A will devised a life estate and the remainder to "the St. Joseph Catholic Orphan Asylum in St. Louis, Missouri." At the date of the will, an entity so named, but there was a corporation of the Roman Catholic Orphan Asylum of St. Louis, Missouri, which there was then and has continued to exist as an incorporated charitable institution known as "The St. Joseph Catholic Orphan Asylum," to the support of which the testator was contributing, including that in which testator worked, whether the contributions were made directly or indirectly, did not appear. Upon the incorporation of the Roman Catholic Orphan Asylums of St. Louis, Missouri, by the St. Joseph Catholic Orphan Asylum, the incorporated orphan asylums in St. Louis was turned over to the diocese as president of "The Roman Catholic Orphan Asylums of St. Louis," for the support of the orphan asylums, and the property subsequently acquired. *Held*, that, in spite of the mistake in the name of the corporation, the corporation is entitled to take the devise.

Incorporated Charitable Institution. A charitable devise will be upheld and enforced if made to a corporation or incorporated association. The corporate character is a prerequisite to the validity of such a devise.

BILL OF EXCEPTIONS—Continued.

pear in the record proper can be reviewed on appeal—although the abstract contains what purports to be a bill of exceptions in which the filing of the motion and bill is recited. *Willson v. Reed*, 400.

8. **No Order of Court.** It is not a necessary prerequisite, in a case arising since the passage of the Act of 1911, to the right to file a bill of exceptions, that the trial court should make an order during the term at which exceptions were taken granting leave to file the bill thereafter. If the exceptions which comprise the bill were taken at the May term, 1912, and no entry or order was made at that term granting leave to file the bill thereafter, a bill presented, allowed and filed at the November term, 1914, being prior to the time plaintiffs in error were required to serve their abstract, will be considered for purposes of review. *State ex inf. v. Sweaney*, 685.

BONDS FOR PUBLIC ROADS. See *Constitutional Law*, 25 and 26.

BRIEFS.

Appellate Practice: Inadvertent Admission in Brief. An admission in the record by counsel for appellant which is contradictory of the whole theory of his case and of his brief and argument based upon a contrary fact, will be considered on appeal as having been inadvertently made, or as a clerical error in the writing or printing of the record. *Lumber Co. v. Ripley County*, 121.

CARRIER AND SHIPPER.

Overcharges: Charges Paid Connecting Carrier. Where the consignees of a freight shipment were not located on defendant's railroad, and a connecting company transported the cars to the consignees, for a consideration charged to and paid by defendant, and by the defendant charged to and paid by the shipper, the defendant has no legal right to surcharge the shipper's account with such connecting charges, but when sued for the overcharges should be required to respond in damages for whatever overcharges it made and collected in excess of the rates fixed by the statutes. *White v. Delano*, 16.

CERTIORARI.

1. **Quashing Judgment in Like Cases.** Where suit was brought on policies of fire insurance against several insurance companies, and appeals were taken by all the defendants from judgments in favor of plaintiff to the Court of Appeals, and in that court the cases were submitted together, the questions involved being the same in all, and that court rendered an opinion in only one of them, disposing of the others by memorandum opinions referring for their rulings to the opinion in the one case, and that opinion is quashed on *certiorari* as being in conflict with the prior rulings of this court, the judgments in the other cases will also be quashed upon *certiorari*. *State ex rel. v. Ellison*, 47.
2. **Opinion of Court of Appeals: Judgment Right Despite Conflict.** Although the opinion of the Court of Appeals conflicts with prior rulings of the Supreme Court in certain particulars, it will not be quashed upon *certiorari* if upon good reasons in law the judgment directed by it was right. Notwithstanding the opinion of the Court of Appeals conflicted with the prior rulings of the Supreme Court in holding that the payment of the illegal tax was not made under duress, yet if it correctly decides that, whether or not duress was exercised, the tax cannot be recovered from the

CERTIORARI—Continued.

collector, its judgment based upon that decision will be upheld. *State ex rel. v. Reynolds*, 589.

3. **Quashing Opinion of Court of Appeals.** The Court of Appeals cannot preclude a review by the Supreme Court of an instruction that is broader than the pleadings by merely saying it is harmless. *State ex rel. v. Ellison*, 645.

CHARITIES.

1. **Evidence: Objection: Raised First on Appeal.** An objection that a will, the common source of title, was not shown to have been admitted to probate, comes too late if made for the first time in appellant's brief. *Schneider v. Kloepple*, 389.
2. **Will: Reasons for Devise.** It was reasonable and natural that a devout Catholic, dying without descendants, should devise his real estate to his wife, to use as she pleased during her life, the remainder at her death to go to a benevolent association of the church of his faith. *Ib.*
3. ———: **Heirs and Assigns Not Used: Intention.** Although the words "heirs and assigns" are not used, a devise, in the absence of words of limitation, conveys the fee, unless the language employed shows a lesser estate was intended. In the latter case, the lesser estate is created. *Ib.*
4. ———: **Life Estate With Power of Disposal: Remainder: Intention.** The language of a will was: "The real estate I bequeath to my wife Anna Maria Brink to use as she pleases, and at her death what remains is to go to the St. Joseph Catholic Orphan Asylum in St. Louis." *Held*, that an absolute estate in fee was not devised to Anna Maria, but the intention was, by language as clear and unambiguous as the words of creation, to create a remainder; that is, a life estate in her, with power of disposal, the remainder to vest in the Orphan Asylum. *Ib.*
5. ———: **Indefinite Devisee: Erroneous Name.** A will devised a life estate to testator's wife and the remainder to "the St. Joseph Catholic Orphan Asylum in St. Louis, Missouri." At the date of his death there was no legal entity so named, but there was a corporation entitled "The Managers of the Roman Catholic Orphan Asylum of St. Louis;" and there was then and has continued to exist since a voluntary unincorporated charitable institution known as "The St. Joseph Catholic Asylum," to the support of which the churches of the diocese, including that in which testator worshipped, contributed, but whether the contributions were made directly or indirectly does not appear. Upon the incorporation of "The Managers of the Roman Catholic Orphan Asylums of St. Louis," the property owned by the St. Joseph Catholic Orphan Asylum and other incorporated orphan asylums in St. Louis was turned over to the archbishop of the diocese as president of "The Managers of the Roman Catholic Orphan Asylums of St. Louis," for the benefit of said orphan asylums, and the property subsequently acquired was so held and used. *Held*, that, in spite of the mistake in naming the devisee, the corporation is entitled to take the devise. *Ib.*
6. ———: ———: **Unincorporated Charitable Institution.** A charitable devise or bequest will be upheld and enforced if made to a voluntary unincorporated association. The corporate character of the devisee is not a prerequisite to the validity of such a devise. *Ib.*

CHARITIES—Continued.

7. ———: ———: **Erroneous Name.** Where a beneficiary is designated in a will by an erroneous name the bequest will not be avoided, if, by means of the name or by extrinsic evidence, the beneficiary may be identified. *Schneider v. Kloepple*, 389.

CIRCUIT CLERKS. See *Damages*, 2 to 4.

CITIES.

1. **Charter Provisions: Special Laws.** It was not intended that the provision of the Constitution of 1875, which provided that the charter to be framed for the city of St. Louis "shall supersede all special laws relating to St. Louis County," should for all future time be the controlling law upon the subject-matter covered by said existing special laws; for the Constitution also says that such charter "shall always be in harmony with and subject to the Constitution and laws of this State," that the city shall "collect the State revenue and perform all other functions in relation to the State in the same manner as if it were a county," and that "The General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties;" and although there was a "special law" applicable to the county of St. Louis providing for the election of a collector for said county when the Constitution of 1875 was adopted, and the charter as framed named the collector as a city officer and provided for his election, the General Assembly, under these constitutional provisions, had authority to enact a statute applicable to all counties, including the city of St. Louis, and to require the election of a collector of the revenue in each at the general election held in November, 1906, and every four years thereafter, as it did in 1905, *Laws 1905*, p. 272. *State ex inf. v. Koeln*, 174.
2. **Contract: Water Supply to Citizens Outside City: Abrogation by Extension of City Limits.** An existing contract fixing a rate for water service and bottomed on a valuable consideration, between a private consumer who lives outside the city limits, and a public utility company operating within the city, is not abrogated and the parties are not bound by the city's water-rates *ipso facto* when the consumer is taken into such city by the extension of its limits. [*Overruling State ex rel. Waterworks Co. v. Geiger*, 246 Mo. 74.] *State ex rel. v. Eastin*, 193.
3. ———: **Between City and Water Company: Rates Subject to Alteration by City.** Under the statute declaring that "when water shall be taken by private individuals from any waterworks not owned by the city, the mayor and common council shall have the right, by ordinance, from time to time, to fix the rates to be charged therefor," a public water company is to be held to have contracted with the city with full imputed knowledge of and subject in all ways to all powers and restraints connoted by said statute, and is bound thereby just as fully as if it had been written at large in its franchise contract with the city, and no reduction of rates by ordinance would amount to a violation of the obligation of a special contract between the company and a consumer who stands in exact equality with other consumers. But an independent contract of a water company (which has a franchise contract with the city to furnish water to its inhabitants) to furnish water at higher rates to a consumer outside the city limits, running for a limited and reasonable term, based upon a valuable consideration not paid by city consumers, in which the consumer does not reserve to himself any right of regulation and is not authorized by any statute to regulate rates, is not abrogated or impaired by the extension of the

CITIES—Continued.

city limits so as to include said consumer, and he does not satisfy the obligation of said independent contract by paying the rates imposed by the franchise contract upon consumers of like amounts of water residing within the city prior to such extension.

Held, by WOODSON, J., dissenting, that the consumer in this case (State Hospital No. 2) was not a private citizen, but a public corporation, incorporated for governmental purposes, and both it and the water company contracted with each other knowing the public character of the other and their mutual rights and obligations, and, independent of the contract, it became the legal duty of the water company, after the extension of the city limits, to furnish the hospital water in the same manner and at the same rates it furnished it to others within the extended territory. *Ib*.

4. ———: **Extension of City Limits: Ordinances Applicable to Annexed Territory.** The rule that in all ordinary matters and things the ordinances of an annexing city are at once and automatically extended over the annexed territory does not affect existing private contracts which were not subject to regulation by ordinance at the time they were made. *Ib*.
5. **Ordinance: Void Only in Its Application.** An ordinance or statute may be void only in its application. A rate-fixing ordinance may be valid as to all consumers except to those to whom if applied it would impair or abrogate a valid existing private contract. *Ib*.
6. **Sewer: Taxation of Agricultural Lands.** Notwithstanding plaintiff's lands are used largely for agricultural and garden purposes, have not been platted into blocks and lots, constitute 160 of the 1600 acres in the sewer district, and the tax against them to construct the main sewer will be \$36 per acre, and if constructed no laterals from it through the lands are at present contemplated, yet if there are 3500 inhabitants residing within the district, there are churches, schools and hospitals, the sewer is to be constructed along the course of natural drainage, the district is now totally without sewers and there is no other feasible method for draining the lands included therein, and these agricultural lands within the city limits when laterals are constructed can be drained by the main sewer, its construction will not be enjoined on the ground that the ordinances authorizing it are unreasonable and oppressive. *Whitsett v. Carthage*, 269.
7. ———: ———: **Public Health.** All persons hold their property subject to the laws providing for the public health, safety, morals and general welfare; and if a main sewer is necessary for the public health of a large portion of a city, and will benefit not only the parts densely populated but in time the agricultural lands included in the district also, the owners of such lands cannot enjoin its construction on the theory that it is not necessary for the present enjoyment and use of those lands, they cannot be immediately served by it, and the costs to be taxed against them will be very heavy, possibly confiscatory. *Ib*.
8. ———: **Benefits.** It is not only benefits to real estate that are to be considered in sewer construction. Primarily the benefits are conferred on all the people of a district, through sanitation and health conservation, and secondarily on the real estate taxed with the cost, in that it is made more desirable for business and residential purposes and increased in value. *Ib*.

CITIES—Continued.

9. ———: ———: **Laterals.** The owners of land not reached by lateral sewers are benefited by laterals which connect other improved lands in the district with the main sewer, since they serve to drain away the refuse that would endanger the public health. *Whitsett v. Carthage*, 269.
10. ———: **Laterals: Time of Construction.** The law does not require all lateral sewers of a drainage district to be constructed at the same time. They may be constructed as the necessity for them arises, and not before. *Ib.*
11. ———: **Taxes in Proportion to Benefits.** The fact that the benefits to lands taxed with the costs of a sewer do not exactly equal such costs will not invalidate the construction or the tax bills. Approximate equality is all the law requires. *Ib.*
12. **Extension: Validity.** A contention that the city limits were not legally extended to embrace the lands to be taxed with the costs of constructing a main sewer because no notice of the election was given, will not be considered, if fifteen years have elapsed since the extension was made. *Ib.*
13. **St. Louis Charter: Statute Paramount.** Under the provision of the Constitution authorizing the city of St. Louis to frame and adopt a charter for its own government, the city did not acquire the right to assume all powers the State may exercise within the city limits, but only those incident to it as a municipality or which concern matters of purely local government. *State ex rel. v. Public Service Comm.*, 429.
14. **Constitutional Law: Statute Applicable to Only One City.** A classification according to population which applied at the time of its enactment and up to the present time to only one city, does not render the statute unconstitutional. *Const. Co. v. Realty Co.*, 450.
15. **Judgment: Execution After Ten Years: Special Tax Bill: City Charter: Paramount Statute.** Though the judgment was based upon a benefit assessed against a lot as its share of the cost of a public improvement and the city charter says such judgment shall be a lien until the assessment is paid, such charter provision must yield to the paramount authority of the State statute, and execution cannot issue after the period of ten years mentioned in the statute has expired. *Kansas City v. Field*, 500.
16. ———: ———: **Matter of General Policy.** Whether an execution can be issued upon an unrevived judgment after ten years is a matter pertaining to the general laws and policy of the State, and not one relating strictly to municipal affairs or coming under municipal control. And although the judgment grows out of an assessment of the costs of a public park against lots within the benefit district, and the city charter prescribes as the method of enforcing such assessment the judgment of a court of general jurisdiction, yet that judgment, like any other of such a court, is controlled by the statute, and an execution based on it must follow the course of other executions issuing out of such courts. *Ib.*

COLLATERAL INHERITANCE TAX. See *Inheritance Tax*.

COLLECTOR OF ST. LOUIS. See *County Collector*.

CONSENT.

1. **Construction of Railway in Street: Consent of City.** Since the Constitution (Art. 12, sec. 20) prohibits the General Assembly from enacting a law granting the right to construct and operate a street

CONSENT—Continued.

railroad in any city "without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by said street railroad," the Public Service Commission has no power, although a statute attempts to authorize it to do so, to order a private company, operating a street railway on certain streets of a city, to apply to the municipal authorities for a franchise to construct and operate a street railway on other streets. State ex rel. v. Public Service Comm., 429.

2. ———: **Compulsion: By Indirection.** Consent such as the law recognizes cannot be the subject of compulsion. Its existence depends on the exercise of the voluntary will of those from whom it is obtained. The Public Service Commission cannot by an order directing a private corporation to extend its railway tracks upon unoccupied public streets and to obtain within thirty days the permission of municipal authorities to do so, compel, in this indirect way, said authorities to consent to such extension. *Ib.*

CONSOLIDATED SCHOOL DISTRICTS. See *Schools*.

CONSTITUTIONAL LAW.

1. **Penalty Pendente Lite: Violation of Freight Law.** The penalty of treble-damages imposed by the Maximum Freight Rate acts of 1905 for an overcharge by a railroad company for the carriage of commodities was suspended during the pendency of the injunction suit brought by the carrier to enjoin the enforcement of the acts on the ground that the maximum rates fixed by them were confiscatory. *White v. Delano*, 16.
2. ———: ———: **Constitutional Right.** The constitutional right of any person whose property or liberty is affected by a statute to bring a suit to test its validity would be impaired and invaded if the penalties imposed by the statute for its violation could be inflicted upon him for violations of the statute during the pendency of a suit brought in good faith. *Ib.*
3. ———: ———: **Right to Sue: Due Process.** The right to sue and defend in the courts is one of the highest and most essential privileges of citizenship, and a statute which imposes on a citizen penalties for bringing a suit to establish his constitutional rights, or that imposes a penalty for its violation during suit pending, would deny to him due process of law, for it would impair his constitutional right to "certain remedy for every injury to person, property or character." *Ib.*
4. **Public Road Fund: Diverted to Other Funds.** Revenue for other county purposes cannot be increased at the expense of the roads. The county court after having made a levy of fifty cents on the hundred dollars for county purposes, the maximum tax it is permitted by the Constitution to levy for those purposes, cannot divert ten cents on the hundred dollars of it to other county purposes, but so much of the fifty cents as is collected from property within a special road district as is levied for road purposes must be credited to the treasurer or commissioners of such district. *Road Dist. v. Ross*, 76.
5. ———: **Discretionary Powers of County Court.** The Legislature has no power to compel the county court to levy the twenty-five-cent tax on the hundred dollars authorized by the constitutional amendment of 1908, but if the tax is levied the county court can apply it to road and bridge purposes, but to no others. But the county court is compelled to levy at least ten cents on the hundred dollars

CONSTITUTIONAL LAW.—Continued.

under Sec. 10481, R. S. 1909, for road purposes, and that much at least of the general revenue of the county it must apply to the road districts from which the tax arises, to be spent, not by it, but by the agencies which the statute designates. *Road Dist. v Ross*, 76.

6. ———: **Charter Provisions: Special Laws.** It was not intended that the provision of the Constitution of 1875, which provided that the charter to be framed for the city of St. Louis "shall supersede all special laws relating to St. Louis County," should for all future time be the controlling law upon the subject-matter covered by said existing special laws; for the Constitution also says that such charter "shall always be in harmony with and subject to the Constitution and laws of this State," that the city shall "collect the State revenue and perform all other functions in relation to the State in the same manner as if it were a county," and that "The General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties;" and although there was a "special law" applicable to the county of St. Louis providing for the election of a collector for said county when the Constitution of 1875 was adopted, and the charter as framed named the collector as a city officer and provided for his election, the General Assembly, under these constitutional provisions, had authority to enact a statute applicable to all counties, including the city of St. Louis, and require the election of a collector of the revenue in each at the general election held in November, 1906, and every four years thereafter, as it did in 1905, *Laws 1905*, p. 272. *State ex inf. v. Koeln*, 174.
7. **County Taxes: Road Purposes: Twenty-Five Cent Levy: Not Designated as Special Tax.** The constitutional amendment (Sec. 22, art. 10, Constitution) does not require the name by which the "special tax" of twenty-five cents for road purposes is authorized, to be specified as a part of the record order levying it. The fact that it is levied nominally "for road and bridge purposes" and that it is in excess of the tax authorized by section 11 of article 10 of the Constitution, fixes its status as a special tax, and limits its use when collected. It is only necessary that it should be levied separately from and "in addition to" the levy "authorized for county purposes" and that it should appear to be "for road and bridge purposes." *State ex rel. v. Railroad*, 251.
8. ———: ———: ———: **Use for Other Purposes: Agency Expending It.** The twenty-five cent road tax authorized by the constitutional amendment of 1908 cannot be used for any other purpose than for roads and bridges, but neither the amendment nor the statute designates the particular agency, among those lawfully charged with the duties to which the purpose pertains, by whom it is to be expended. *Ib.*
9. **Damages: Section 5425: Fixing Penalty.** Since the statute itself fixes the penalty plaintiff may recover at \$2000, it is not to permit her to fix the penalty and therefore to render the statute unconstitutional, to permit her to sue for \$2000 as a penalty alone and to forego any demand for compensation. *Johnson v. Railroad*, 418.
10. **Public Service Commission: Powers: Limited by Constitution.** Despite the fact the statutes of other States creating public service commissions and defining their powers may be similar to and are often identical with our own, in construing the Missouri act little aid is afforded by the decisions of such States, since their organic laws are different from ours, and our legislative acts are

CONSTITUTIONAL LAW.—Continued.

restricted by plain constitutional provisions. *State ex rel. v. Public Service Comm.*, 429.

11. ———: ———: ———: **Consent of City.** Since the Constitution (Art. 12, sec. 20) prohibits the General Assembly from enacting a law granting the right to construct and operate a street railroad in any city "without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by said street railroad," the Public Service Commission has no power, although a statute attempts to authorize it to do so, to order a private company, operating a street railway on certain streets of a city, to apply to the municipal authorities for a franchise to construct and operate a street railway on other streets. *Ib.*
12. ———: ———: ———: ———: **Source of Power.** The source of the power to consent to the construction of a railway on a public street is the local authorities; the language of the constitutional provision (Art. 12, sec. 20) is not directed solely to corporations seeking the privilege to construct and operate a street railroad; a condition precedent to the validity of a statute authorizing such use of a public street is that the consent of the local authorities be first obtained. *Ib.*
13. ———: ———: ———: **Exceptions to Constitutional Inhibition.** Modifications in the application of a constitutional provision are permissible only in the presence of clearly defined exceptions, and where such are neither expressed nor implied neither courts nor the General Assembly have any authority to make them. *Ib.*
14. ———: ———: ———: ———: **Legislative Modification.** In a conflict between the Constitution and a statute the latter must yield. Subsequent legislation cannot modify the Constitution. *Ib.*
15. ———: ———: **Statute Restricted to Constitutional Limitations.** It will not be presumed that the Legislature intended to enact an invalid law. The extensive powers given by section 49 of the Public Service Act, Laws 1913, p. 588, to the Commission to order a street railway to construct additional tracks and make such changes, improvements and additions as may promote the security and convenience of the public or secure adequate service or facilities for the transportation of passengers, are to be construed as subservient to and in harmony with the constitutional provision forbidding such extensions until the municipal authorities consent to such construction, and not as authorizing the Commission to order the railway company to take the initiative in procuring the required consent. *Ib.*
16. ———: ———: **Scope of Statute: Incidental Facilities.** The Public Service Commission has power to order the construction of such sidetracks, switches, cross-overs and terminals as are incidental to the operation of the main lines of an existing railway corporation; but the Legislature has no constitutional authority, and hence the Commission is not empowered, to compel such corporation, in the absence of authority in its charter, to enter new territory by the extension of its lines of railway upon other public streets. *Ib.*
17. ———: ———: **St. Louis Charter: Statute Paramount.** Under the provision of the Constitution authorizing the city of St. Louis to frame and adopt a charter for its own government, the city did not acquire the right to assume all powers the State may exercise within the city limits, but only those incident to it as a municipality or which concern matters of purely local government. *Ib.*

CONSTITUTIONAL LAW.—Continued.

18. ———: ———: ———: **Control of Public Utilities.** The provisions of the present St. Louis charter which attempt to vest in the Board of Aldermen full power to regulate the construction, operation, charges and facilities of a public utility, not being a matter of purely local or municipal concern, must yield to the paramount authority of the statute investing such regulation in the Public Service Commission. *State ex rel. v. Public Service Comm.*, 429.
19. **Statute Applicable to Only One City.** A classification according to population which applied at the time of its enactment and up to the present time to only one city, does not render the statute unconstitutional. *Const. Co. v. Realty Co.*, 450.
20. **Railroad Rates: Power of Public Service Commission.** Section 47 of the Public Service Commission Act, Laws 1913, p. 583, confers upon the Commission authority to raise railroad rates above the maximum theretofore fixed by the Legislature. *State ex rel. v. Pub. Serv. Comm.*, 547.
21. ———: **General Powers of Legislature.** The General Assembly may pass any law upon any subject not forbidden by the organic law. That power is conferred by section 1 of article 4 of the Constitution, which says that "the legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'the General Assembly of the State of Missouri.'" Pursuant to this general power to enact legislation, the General Assembly had enacted laws fixing maximum passenger and freight charges prior to the incorporation of section 14 of article 12 in the Constitution of 1875 which explicitly conferred the power of "establishing reasonable maximum rates." [Explaining statement in *State v. M. K. & T. Co.*, 262 Mo. l. c. 522.] *Ib.*
22. ———: **Railroad Rates: Power of Legislature.** The General Assembly has power to fix reasonable maximum rates for the carriage of freight and passengers, in the absence of any specific authority such as is contained in section 14 of article 12 of the Constitution explicitly conferring the power. *Ib.*
23. ———: ———: ———: **Delegation of Power.** The power of prescribing maximum rates for common carriers, which the Legislature inherently possesses, may be delegated to a railroad commission or to a public service commission, unless inhibited by express constitutional provision. And if the fixing of rates is to proceed intelligently along lines of fairness to all concerned—to passenger, shipper, carrier, laborer and the public—with due regard to constant mutations in costs of labor and the amount of traffic, the matter should be delegated to a body having time for investigation and aided by expert machinery and having greater flexibility than a short-term Legislature possesses. *Ib.*
24. ———: ———: ———: **Constitutional.** Although by doing so it repealed existing statutes fixing maximum rates, the Legislature was not inhibited by the provision of the Constitution declaring that "the General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in the State, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads" from creating the Public Service Commission and directing it, after a hearing and proper expert investigation, to ascertain what maximum rates are reasonable and fix the same by an order, and declaring that said rates so ascertained and

CONSTITUTIONAL LAW.—Continued.

fixed should "thereafter be observed" by the railroads. The Legislature did not thereby delegate to the Commission the absolute power of fixing maximum rates, but only the power to ascertain and determine what rates are reasonable, and it is those rates that the General Assembly "established"—subject all the time to review by the courts as to their reasonableness.

Held, by BOND, J., dissenting, that since the General Assembly did exercise its exclusive power to establish and fix maximum rates, it could not thereafter exercise it again except through the medium of its own power as a legislative body; and since the Constitution says that the General Assembly shall establish maximum rates, it was powerless to delegate the power to any commission, and to do so is to contravene this constitutional provision. *Ib.*

25. **Public Road Bonds: Maximum County Indebtedness: Five Per Cent Limit: Legislative Exercise.** A county may incur an indebtedness in excess of five per cent of its assessed taxable wealth for the purpose of improving public roads in the county. By the amendment to the Constitution adopted in 1906 the theretofore existing maximum limit of five per cent upon the amount of county bonded indebtedness for road purposes, was removed; and Sec. 10520, R. S. 1909, enacted in 1907, Laws 1907, p. 411, authorized the exercise by the county of the constitutional power conferred by that amendment. *State ex rel. v. Hackman*, 658.

26. ———: **Use on City Streets: A County Use.** Proceeds from an issue of bonds by a county to improve the public roads in the county, under the constitutional amendment of 1906 and the Act of 1907, may be used in improving parts of city or village streets which form a part of the system of the public roads to be improved. The use of the fund for improving portions of the city streets that form connecting links in the connected system of public roads in the county is for a county use or purpose, and not a purely municipal purpose, and is vastly different from turning over a part of the fund to city treasuries to be used in improving streets. [Distinguishing *State ex rel. Kirkwood v. County Court*, 142 Mo. 575, and *Green City v. Martin*, 237 Mo. 1. c. 484; and disapproving *obiter dictum* in *State ex rel. St. Louis County v. Gordon*, 268 Mo. 713.]

Held by WALKER, J., dissenting, with whom FARIS, J., concurs, that the streets of an incorporated city or town are not within the purview of the Act of 1907. *Ib.*

27. **Constitutional Question: Untimely Raised.** A constitutional question is neither timely nor otherwise sufficiently raised by an assignment in the motion in arrest that "the facts stated in said information do not constitute a charge or offense under the Constitution and laws of this State" and by an allegation in the assignment of errors that the statute in question is in violation of section 8 of article 1 of the Constitution of the United States. *State v. Swift & Co.*, 694.

28. ———: **Assignment Must Be Specific.** To raise a constitutional question the particular provision of the Constitution alleged to be violated must be pointed out. *Ib.*

29. ———: **Previously Decided.** A plea of unconstitutionality will not confer jurisdiction where the Supreme Court has theretofore held the statute in question valid. *Ib.*

CONSTITUTIONAL LAW—Continued.

30. ———: **Appeal; Transfer to Court of Appeals.** If the constitutional question was neither timely nor otherwise sufficiently raised and the statute under which defendant was convicted of a misdemeanor has previously been adjudged to be constitutional, the case will be transferred to the proper Court of Appeals for final determination. *State v. Swift & Co.*, 694.

CONTRACTS.

1. **Water Supply to Citizens Outside City; Abrogation by Extension of City Limits.** An existing contract fixing a rate for water service and bottomed on a valuable consideration, between a private consumer who lives outside the city limits, and a public utility company operating within the city, is not abrogated and the parties are not bound by the city's water rates *ipso facto* when the consumer is taken into such city by the extension of its limits. [Overruling *State ex rel. Waterworks Co. v. Geiger*, 246 Mo. 74.] *State ex rel. v. Eastin*, 193.
2. **Between City and Water Company: Rates Subject to Alteration by City.** Under the statute declaring that "when water shall be taken by private individuals from any waterworks not owned by the city, the mayor and common council shall have the right, by ordinance, from time to time, to fix the rates to be charged therefor," a public water company is to be held to have contracted with the city with full imputed knowledge of and subject in all ways to all powers and restraints connoted by said statute, and is bound thereby just as fully as if it had been written at large in its franchise contract with the city, and no reduction of rates by ordinance would amount to a violation of the obligation of a special contract between the company and a consumer who stands in exact equality with other consumers. But an independent contract of a water company (which has a franchise contract with the city to furnish water to its inhabitants) to furnish water at higher rates to a consumer outside the city limits, running for a limited and reasonable term, based upon a valuable consideration not paid by city consumers, in which the consumer does not reserve to himself any right of regulation and is not authorized by any statute to regulate rates, is not abrogated or impaired by the extension of the city limits so as to include said consumer, and he does not satisfy the obligation of said independent contract by paying the rates imposed by the franchise contract upon consumers of like amounts of water residing within the city prior to such extension.
Held, by WOODSON, J., dissenting, that the consumer in this case (*State Hospital No. 2*) was not a private citizen, but a public corporation, incorporated for governmental purposes, and both it and the water company contracted with each other knowing the public character of the other and their mutual rights and obligations, and, independent of the contract, it became the legal duty of the water company, after the extension of the city limits, to furnish the hospital water in the same manner and at the same rates it furnished it to others within the extended territory. *Ib.*
3. ———: **Extension of City Limits: Ordinances Applicable to Annexed Territory.** The rule that in all ordinary matters and things the ordinances of an annexing city are at once and automatically extended over the annexed territory does not affect existing private contracts which were not subject to regulation by ordinance at the time they were made. *Ib.*
4. **Ordinance: Void Only in Its Application.** An ordinance or statute may be void only in its application. A rate-fixing ordinance

CONTRACTS—Continued.

may be valid as to all consumers except to those to whom if applied it would impair or abrogate a valid existing private contract. *Ib.*

5. **Deed of Trust and Note: One Contract: Independent Conditions.** A note and deed of trust given to secure its payment, both executed at the same time, are one contract and must be construed together, so that effect may be given to all the terms of both instruments where possible to do so; and so a deed of trust may be foreclosed before the maturity of the note which it secures if it has provisions or conditions upon which a forfeiture will take place independently of the terms of the note. *Wilson v. Reed*, 400.
6. **Interstate Shipments: Governed By U. S. Laws.** The liability of a common carrier upon contracts concerning interstate shipments is governed by the Interstate Commerce Act and amendments thereto; and the construction of that act by the Federal courts is conclusive upon State courts. *Lumber Co. v. Railroad*, 629.
7. ———: **Bonus or Refund on Interstate Shipments for Increase in Business.** A contract between a lumber company, about to locate large mills, and a railroad company desiring to have them located upon its lines in order that it might receive the manufactured lumber for shipment and the increase in traffic which would result from the building up of a new town, by which the railroad company agreed in consideration of the erection of the mills at a designated point on its lines, to give to the lumber company an amount equal to half of the freight charges received by the railroad on interstate shipments of machinery and materials that went into the construction of the plant, was in violation of the Interstate Commerce Act, even prior to the amendment of 1906, whether said amount to be given or paid be considered a bonus graduated on the amount of shipments done, or a refund or drawback on rates paid, or reduced rates. *Ib.*
8. ———: ———: **Other Inducements: Promotion of Public Enterprises: Device.** The contention that the giving to a lumber company an amount of money equal to one half the freight charges received on all materials that went into the construction of its big mills in consideration of its location of its plant along the line of defendant's railroad, was not a rebate or drawback in freight rates, but merely the promotion of a public enterprise which would redound to the prosperity of the railroad, namely, the aiding in building up a town which would grow in public importance, with consequent demands for increased freight and passenger transportation, cannot be sustained, because the Interstate Commerce Act prohibits any device or indirect method of enforcing higher charges against one shipper than another, and has for its chief design the prevention of any discrimination among shippers that, by reason of rebates or draw-backs and the advantages derived from them, will enable large dealers to crush out or cripple smaller competitors who have no such advantages; and a bonus to a favored shipper is a discriminatory device. *Ib.*
9. ———: **Evidence: Established Rates.** A stipulation in the agreed statement of facts that the rates charged and paid by the shipper were the "regular, published tariff rates" is evidence that the rate the shipper paid was the "legally established and published rate" and sufficient in an action arising on account of a discrimination in violation of the Interstate Commerce Act, although there was no evidence that the rates were filed with the Interstate Commerce Commission and posted. *Ib.*

CONVEYANCES.

1. **Outstanding Equities: Constructive Notice: Special Warranty Deed.** A purchaser by general warranty, in whose chain of title is a remote recorded deed which in effect is nothing more than a quit-claim with a special warranty covenanting against any one who might claim under the grantor therein, is not thereby, being without actual notice, chargeable with constructive knowledge of outstanding equities existing at the time the special warranty was made. *Marston v. Catterlin*, 5.
2. ———: ———: ———: **Grantee Under Quit-Claim.** A subsequent grantee in a general warranty deed is not prevented from occupying the position of a bona-fide purchaser, without notice, merely because some prior conveyance in his chain of title is a quit-claim or special warranty deed. In such case the general rule applicable to the grantee in a quit-claim deed, should not be applied to a grantee in a subsequent warranty deed. [*Distinguishing Mason v. Black*, 87 Mo. 329, and *Freeman v. Moffitt*, 119 Mo. 280.] *Ib.*
3. **Sheriff's Deed: Unacknowledged: Sale by Purchaser: Relation.** The grantee of the purchaser at a tax sale who conveyed by a deed recorded before the sheriff had acknowledged his deed to him, took the title, as against a subsequent grantee of said purchaser with constructive notice. As to the purchaser at the tax sale, the sheriff's deed, upon its subsequent acknowledgment, related back to the day of sale; and the purchaser's deed to his first grantee took priority over a subsequent deed made by him after his first deed and the sheriff's deed had been recorded. *Land & Mfg. Co. v. Hunter*, 62.
4. ———: **Vendible Interest.** The purchaser at a sheriff's sale acquires an interest which is vendible even prior to the acknowledgment of the sheriff's deed; and a sale by him and the title which the grantee acquires cannot be affected by subsequent attempt of such purchaser again to convey the land to another grantee; and the vendible character of his interest is not affected by the fact that after he had parted with his right to demand a deed from the sheriff the sheriff acknowledged his deed, his own deed and the sheriff's deed both being recorded before he attempted to convey to others, constructive notice being thereby given. *Ib.*
5. **Island in River: Not Surveyed: Reservation.** An unrestricted deed conveying land bordering on a river, or a Government patent conveying land adjacent to a non-navigable river, conveys all accretions thereto; and a patent conveying by Government subdivisions lands bordering a non-navigable river conveys all land between the meander line of the shore and the middle thread of the river, unless previous to the issuance of the patent the Government surveyed such lands as governmental subdivisions, or expressly reserved them when not surveyed. *Lumber Co v. Ripley County*, 121.
6. **Island in Current River.** A small island of a few acres in Current River, east of the middle thread of the river, existing prior to 1821 when the Government surveyed the surrounding lands, the field notes showing meander lines running along or near the banks of the river, but neither crossing nor touching the island and the survey in no wise mentioning or including but entirely ignoring it, was included in the patent of the fractional Government sub-division of the shore land on the east bank made in 1849, which did not reserve it. It was not reserved and re-

CONVEYANCES—Continued.

Inquired to the State upon the admission of Missouri to the Union. *Ib.*

7. ———: **Purpose of Meander Lines: Include Islands and Overflow Lands.** Meander lines run by a Government survey along or near the margin of a non-navigable stream were run for the purpose of ascertaining the exact quantity of upland to be charged for, and not for the purpose of limiting the title of the patentee to such meander lines. Low and overflow lands and small islands within the banks of such a river were included by a patent conveying the land by Government fractional subdivisions. *Ib.*
8. **Equitable Title: From Husband to Wife: Statute of Uses.** If the estate vested in the wife by a deed directly to her from her husband, made prior to the Married Woman's Acts, remained in her until after his death, the Statute of Uses upon his death executed the dry trust, and her deed thereafter conveyed the legal title. *Carson v. Lumber Co.*, 238.
9. **Lost Deed: Quantum of Proof: Remote Transaction.** There is no hard-and-fast rule concerning the quantum of parol proof necessary to establish a lost deed. Accuracy and detail are expected in establishing a recent transaction, and absence of them would be ground of suspicion; but remoteness necessarily affects the character of the proof, and definiteness and accuracy of detail in such case would arouse suspicion. The rule that the proof must be "clear, cogent and convincing" does not mean that the proof of the same amount of definite detail should be required in every case, without regard to remoteness or lapse of time, but depends upon the circumstances of the case, the nature of the claim, possession, assertion of ownership, etc. *Jones v. Kirk*, 408.
10. ———: **Long Possession: Presumption.** Where there are uncontradicted facts and circumstances from which it is inferable that in 1860 the owner of a one-ninth interest in land and her husband conveyed it to another cotenant, the purchase price was paid, and the deed executed and acknowledged, and was destroyed by fire in the burning of the grantee's house during the Civil War; that said grantee conveyed two-ninths interest in 1867 to a grantee who had acquired the other seven-ninths, and since said date said last grantee and those who claim under him have been in possession, claiming to be the owners, and have paid the taxes, and no assertion of title was made until long after both the original grantor and grantee were dead, it will be presumed that a deed was made in 1860 sufficient in form to convey said one-ninth interest. *Ib.*
11. ———: ———: ———: **Legal Formalities.** The presumption from all the circumstances that a deed sufficient to convey the land was executed and delivered implies that the deed was executed according to then existing formalities. *Ib.*

CORPORATIONS.

1. **Drainage District: Municipal Corporation.** A drainage district is a municipal corporation, and must be provisionally incorporated as such before any step can be taken looking to the drainage of land embraced therein. In re Drainage District, *Buschling v. Ackley*, 157.
2. ———: **Property Rights Affected by Incorporation.** That a person or his property has been included in a drainage district in no manner affects his rights, provided his property has not been benefited or damaged. *Ib.*

CORPORATIONS—Continued.

3. ———: **Raised in Suit on Tax Bill.** Whether a drainage district has been legally incorporated or not can be raised in a suit on the tax bills. *Buschling v. Ackley*, 157.
4. **Venue: Foreign Corporation.** An action by summons against a foreign business corporation duly licensed to do business in this State cannot be instituted in any county other than the county in which either the cause of action accrued or in which the corporation has and usually keeps an office or agent for the transaction of its usual and customary business. If the cause of action accrued in St. Francois County, and the defendant is a New York corporation licensed to do business in this State and maintains an office and agent for the transaction of its usual and customary business in Jefferson County, but has no such office or agent in the city of St. Louis, the suit by a citizen of Illinois cannot be maintained in said city. The word "corporations" used in Sec. 1754, R. S. 1909, comprehends foreign as well as domestic corporations. *State ex rel. v. Jones*, 230.
5. **Statutory Construction: Inclusion of Things Existent and Subsequent: Corporations.** A statute general in terms may be made to apply to conditions non-existent at the time of its enactment. If expressed in words of the present tense it will generally be construed to apply not only to things and conditions existing at its passage, but will also be given a prospective interpretation and applied to such as come into existence thereafter. Sec. 1754, R. S. 1909, stating the venue of suits against corporations, embraces foreign corporations, even though it be admitted that they could not have been served with process in this State at the time of its enactment in 1855. *Ib.*
6. **Venue: Foreign Corporation: Governed by Section 1754: Non-Resident.** The venue of a suit against a foreign industrial corporation licensed to do business in this State is governed by section 1754, Revised Statutes 1909, and therefore it is not necessary or proper to construe the term "non-residents" used in the fourth subdivision of section 1751. [*Distinguishing Stone v. Insurance Co.*, 78 Mo. 655, and *N. Y., L. E. & W. Railroad Co. v. Estill*, 147 U. S. 591.] *Ib.*

COUNTERFEITING. See *Forgery*, 1 and 2.

COUNTY CLERKS.

1. **Money Had and Received: Payment: Judgment on Pleadings.** In a suit by the State against a county clerk to recover back money paid, an allegation charging that he had wrongfully and falsely certified to the State Auditor that he had extended the taxes upon the assessor's book, and by said false certificate had received a definite sum of money from the State for work he had not at the time performed, is covered by a general denial, and a judgment on the pleadings cannot stand, unless the other plea in the answer that the money was voluntarily paid, with full knowledge of the facts, before any of the work had been done, and that the work was afterwards done by him during his same term of office, constitutes no defense. *State ex rel. v. Scott*, 146.
2. ———: ———: **By Public Officers: Mistake of Law.** Where all the participants were officers each acting solely in his official capacity, the rule that money paid under a mistaken view of the law, with full knowledge of the facts, cannot be recovered, has no application. In such case the officer receiving the money must

COUNTY CLERKS—Continued.

find his right thereto in the law; and no subsequent approval, acquiescence or settlement, non-judicial in character, can operate to justify an unlawful act. Ib.

3. ———: ———: **Before Work is Done: Work Done Before Suit: Purpose of Extension on Assessment Book.** The statute (Sec. 11549, R. S. 1909) which allows compensation to the county clerk for "services rendered" in "extending the taxes on the assessment book" does not designate the time within which the work is to be done, nor fix a penalty for failure to do it before making out and delivering the tax book to the collector, and the act is such that the time of its performance has no effect upon the validity of the tax, and is important only (1) as an aid to the clerk in correctly extending the taxes upon the tax book and (2) as a permanent public record of the amount of the tax in accordance with the final orders of the county and state boards; and in an action by the State to recover back money from the county clerk, paid by the State Auditor before the work of extending the taxes on the assessment book was done, but which was done before the action was instituted, there can be no recovery on the theory either (1) of enforcing a penalty for not doing the work sooner or (2) that the payment having been made the duty to do it ceased and its performance thereafter was a work of supererogation. Ib.

COUNTY COLLECTOR.

1. **Collector of St. Louis: Elected in April, 1913.** No one could be or was legally elected to the office of Collector of the Revenue for the city of St. Louis at the April election held in 1913. Said office is a county office, and the statute (Sec. 11432, R. S. 1909; Laws 1905, p. 272) requires the Collector to be elected at the general election held in November, 1906, and every four years thereafter. State ex inf. v. Koeln, 174.
2. ———: **Charter Provisions: Special Laws.** It was not intended that the provision of the Constitution of 1875, which provided that the charter to be framed for the city of St. Louis "shall supersede all special laws relating to St. Louis County," should for all future time be the controlling law upon the subject-matter covered by said existing special laws; for the Constitution also says that such charter "shall always be in harmony with and subject to the Constitution and laws of this State," that the city shall "collect the State revenue and perform all other functions in relation to the State in the same manner as if it were a county," and that "The General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties;" and although there was a "special law" applicable to the county of St. Louis providing for the election of a collector for said county when the Constitution of 1875 was adopted, and the charter as framed named the collector as a city officer and provided for his election, the General Assembly, under these constitutional provisions, had authority to enact a statute applicable to all counties, including the city of St. Louis, and to require the election of a collector of the revenue in each at the general election held in November, 1906, and every four years thereafter, as it did in 1905, Laws 1905, p. 272. Ib.
3. ———: **Elected for Unexpired Term: Entrance into Office.** The office of Collector of the Revenue begins in March, and the general statute provides that in case of a vacancy occurring in said office it shall be filled by appointment by the Governor and that such appointee shall hold office until March. The person elected at the

COUNTY COLLECTOR—Continued.

preceding November election to fill an unexpired term does not take possession of the office immediately upon his election, nor until after the next March, whether the Governor filled the vacancy by appointment prior or subsequent to such election. *State ex inf. v. Koeln*, 174.

4. ———: ———: ———: **Appointment After Election.** The fact that the Governor failed to appoint some one to fill the vacancy in the office of Collector of Revenue, which had existed for sometime, until after the election of respondent to fill the unexpired term, did not authorize respondent to assume the duties of the office. The statute does not declare when the appointive power shall be exercised, and he may therefore exercise it at any time before the expiration of the time the statute says his appointee shall occupy the office. Besides, respondent's title to the office comes through and by virtue of the rights incident to his election, and not through any default or delayed action of the Governor. *Ib.*
5. **Payment of Illegal Taxes: Recovery From Collector.** A suit against the city collector, who is the agent of the State in collecting State taxes, to recover back the amount of a State tax illegally demanded and paid to him under duress, cannot be maintained, if he has already transmitted it to the State Treasury. The Legislature alone can give relief in such circumstances. The rule is that where money illegally collected by color of law still remains in the hands of the collector it may be recovered from him by the party paying it; but if it has been paid over by the collector to the proper authorities, he is no longer responsible for it, though it appears he acted under an authority which was void. *State ex rel. v. Reynolds*, 589.

COUNTY COURTS.

1. **Public Road Fund: Devoted to Other Uses.** Section 10481, Revised Statutes 1909, in declaring that the tax of not more than twenty cents authorized by it to be credited to the road district from which said tax is collected shall constitute the road fund of the several road districts of the county, forbids the county court to devote the fund to other uses. *Road Dist. v. Ross*, 76.
2. ———: **Discretion of County Court.** The county court has no discretion as to the levying of at least ten cents on the hundred dollars directed by the amendment of 1913 to section 10481, Revised Statutes 1909; its duty to levy and appropriate at least that much to special road districts is compulsory, and it can divert the tax to no other purpose. Its discretion under that section and amendment pertains only to the levy of an additional tax of ten cents on the hundred dollars' valuation. *Ib.*
3. ———: **Meaning of Statutes.** The theory of the statutes (Socs. 10481 and 10483, R. S. 1909) is: (1) that the bridges and roads are to be first taken care of, so far as that duty is devolved upon the districts, by the constitutional levy for county purposes, to the extent at least of ten cents on the hundred dollars' valuation; (2) if that amount is not sufficient for such purpose the county court may raise it to twenty cents; and (3) in its discretion, it may levy the whole or any part of the twenty-five cent special levy authorized by the constitutional amendment of 1908, to be expended in such manner and through such agencies as are charged by law with the establishment, construction and maintenance of roads and bridges. *Ib.*

COUNTY COURTS—Continued.

4. ———: **Transfer to Other Funds: Modified by Road Laws.** Section 3786, Revised Statutes 1909, declaring that "whenever there is a balance in the county treasury to the credit of any special fund, which is no longer needed for the purposes for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance," is still live law as to all the revenue of the county remaining within the control of the county court; but the road fund has by later enactments been removed from the court's control and entrusted to other agents, to be expended by them for a definite purpose. *Ib.*
5. ———: **Diverted to Other Funds.** Revenue for other county purposes cannot be increased at the expense of the roads. The county court after having made a levy of fifty cents on the hundred dollars for county purposes, the maximum tax it is permitted by the Constitution to levy for those purposes, cannot divert ten cents on the hundred dollars of it to other county purposes, but so much of the fifty cents as is collected from property within a special road district as is levied for road purposes must be credited to the treasurer or commissioners of such district. *Ib.*
6. ———: **Discretionary Powers of County Court.** The Legislature has no power to compel the county court to levy the twenty-five-cent tax on the hundred dollars authorized by the constitutional amendment of 1908, but if the tax is levied the county court can apply it to road and bridge purposes, but to no others. But the county court is compelled to levy at least ten cents on the hundred dollars under Sec. 10481, R. S. 1909, for road purposes, and that much at least of the general revenue of the county it must apply to the road districts from which the tax arises, to be spent, not by it, but by the agencies which the statute designates. *Ib.*
7. **County Taxes: Road Purposes.** The county court in counties in which the assessed valuation of properties is less than six millions, may levy fifty cents on the hundred dollars for county purposes, and set aside fifteen cents of it to improvement of roads; and it can in addition to that fifty cents, levy an additional tax not exceeding twenty-five cents to be used for road-and-bridge purposes but for no other purpose. *State ex rel. v. Railroad*, 251.
8. ———: ———: **Twenty-Five-Cent Levy: Divided Into Two: County Purposes.** The county court levied fifty cents on the hundred dollars' valuation for county purposes, and divided it into five funds, distributing fifteen cents to the fund "for the payment of all necessary expenses incurred in the building and repairing of roads and bridges." The further words of the levy were: "It is further ordered that a property road tax of twenty cents on each one hundred dollars valuation on all property made taxable by law for road purposes be levied and collected for the use and benefit of the respective road districts of the county, when collected to be placed to the credit of said road districts for the purposes specified in the statutes. It is further ordered that a property road-and-bridge tax of five cents on the hundred dollars' valuation be levied on all property made taxable by law, and when collected to be placed to the credit of said Road-and-Bridge Fund as provided by law." *Held*, that the first appropriation of fifteen cents was made in pursuance of the statute as the proportion of the road fund to be derived from the general revenue arising from the maximum levy of fifty cents for county purposes; and the other two levies of twenty and five cents were made under the consti-

COUNTY COURTS—Continued.

tutional amendment of 1908 and Sec. 10482, R. S. 1909, and while no good reason is apparent why the aggregate levy of twenty-five cents should have been thus divided into two, they were both made for the one purpose contemplated by that constitutional amendment and both were legal, and the levy of twenty cents cannot be disposed of as a levy for "county purposes" under section 11 of article 10 of the Constitution. *State ex rel. v. Railroad*, 251.

9. **Drainage District: Additional Assessments to Meet Bonds: Power of County Court.** A drainage district organized under the County Court Act of 1905 and previous acts has no power, even though the benefits reported were in excess of the assessments and the aggregate assessments were less than the bond issue, to subsequently increase the assessments so as to raise enough money to pay the bonds and interest in full as they accrue, but under the then statute exhausted its powers when it made its first assessment. *State ex rel. v. Redman*, 465.
10. **Public Road Bonds: Court Order: What Are Public Roads.** The order of the county court containing a recital that the proceeds of the bond issue shall "be used for the improvement of the public roads of the county" is an essential prerequisite to a valid election under the Act of 1907; but the words "of the county," when compared with the rest of the act and the constitutional amendment of 1906, mean the public roads "in the county;" and since the word "road" is a generic term and includes highways and even streets, the proceeds of the bond sales may be used to improve public roads within unincorporated villages and towns which are connecting links between roads lying outside their limits, and also the roads lying within existing special road districts, and the court order may so declare. *Held*, by WALKER, J., dissenting, with whom FARIS, J., concurs, that a public road means a highway outside the corporate limits of a city or town, while a street means a highway within such limits; and when the term "public road" is used in a statute, a strict compliance with which is necessary to authorize the incurring of an added burden of taxation, it cannot be held to include streets within an incorporated city or town unless that purpose is expressed in the statute with particularity. *State ex rel. v. Hackman*, 658.
11. ———: **Control Over Fund.** Whether the authorities of cities or existing special road districts have exclusive control over the streets and public roads within their respective territories, or whether the county court has authority to make the proposed improvements in the streets and roads therein, contemplated by the proposed county bond issue, does not affect the validity of the bonds, and is not for determination in adjudicating their legality. *Held*, by WALKER, J., dissenting, with whom FARIS, J., concurs, that in the absence of a statute specifically so providing, the county court has no authority to interfere with the care and maintenance of streets in incorporated towns or to extend aid to the municipality in the improvement of their streets. *Ib.*

COUNTY INDEBTEDNESS. See Constitutional Law, 25 and 26.

COUNTY LANDS.

1. **Ripley County: Sale for Fifty Cents Per Acre.** A sale of swamp land granted by the State to Ripley County in 1857, and conveyed by the county to a private citizen in 1859, was not void for that it was sold for fifty cents per acre, for the Act of January 30, 1857, Laws 1856, p. 464, provided that the minimum

COUNTY LANDS—Continued.

price for such lands lying in that county should be fifty cents an acre. [The Act of January 30, 1857, was not considered in *Bayless v. Gibbs*, 251 Mo. 492, and hence it is not an authority for a contrary ruling, and if it intended to announce a contrary ruling it is disapproved.] *Carson v. Lumber Co.*, 238.

2. ———: **Transfer to Another County.** Swamp land was granted by the State to Ripley County by legislative act dated November 4, 1857, and by that county was patented to a private citizen in 1859. In 1864 the line between Ripley and Butler counties was so changed that the land was thrown into Butler. *Held*, that as the title was transferred by Ripley County prior to the change in the boundary, no title ever vested in Butler County, and defendants acquired no title based on a patent from that county. *Ib.*

COUNTY OFFICER. See County Collector.

COURTS.

1. **New Trial: Change in Judge.** If after a motion for a new trial, charging that the verdict is against the weight of the evidence, is filed, the judge who tried the case is succeeded by another, his successor has power to overrule the motion. *Thompson v. Railroad*, 87.
2. **Appeal: Facts of Former Suit: Judicial Notice.** The Supreme Court takes notice of a former appeal and the record thereof, but does not notice the facts and records in one action when called upon to rule another and separate action. *State ex rel. v. Eastin*, 193.
3. **Bill of Exceptions: Change in Judge.** A bill of exceptions agreed to by both parties, and signed by the circuit judge who tried the case, after the county in which the case was tried had been detached from his circuit and added to another, will be considered on appeal. [Refusing to follow *State ex rel. v. Flick*, 179 Mo. App. 236.] *State ex rel. v. Railroad*, 251.
4. ———: **Circuit Judge: State Officer.** The office of circuit judge is a State and in no sense a local office, and the judge as such may exercise his judicial functions in proper cases in any county. His powers, in whatever county exercised, rest upon his election or appointment and qualification by his oath of office; and whenever in the performance of his official duties, he enters upon the trial of a case, he acts within the limits of his official authority, which continues, until the duty is performed or he goes out of office. If he tried the case and is still circuit judge he can settle and approve the bill of exceptions, although the county in which the case was tried is, by legislative enactment, no longer a part of his circuit. *Ib.*
5. **Circuit Court: Power to Order Examination of Premises for Evidence.** The circuit courts of Missouri are courts of original and general jurisdiction, possessing practically the same powers as *visi prius* courts in England, among which was the power to permit plaintiff and his counsel, in a civil suit against a corporation, to visit defendant's manufacturing plant, and enter upon its premises, with experts and photographers, for the purpose of inspecting and measuring the same, and making drawings and taking photographs to be used as evidence in the trial of said action; and such power was not taken away by the constitutional provisions against unreasonable search and seizure, nor is a legislative statute necessary to the exercise of such power by the court. *State ex rel. v. Anderson*, 533.

COURTS—Continued.

6. ———: ———: **Invasion of Property Rights: Similar to Examination by Physicians.** The power of the court to permit plaintiff, in a personal injury action based on a charge of an unsafe place in which to work or unsafe tools, to visit the factory of the company causing the injury, with proper persons and on a proper occasion, for the purpose of obtaining photographs or drawings to be used in the trial of the case, is based on the power of the court to know the facts which determine the plaintiff's right to recover and defendant's liability, and if reasonably exercised is not an invasion of property rights, but is similar to the power of the court to compel the plaintiff suing for personal injuries to submit to an examination by physicians appointed by the court, and for a stronger reason should be upheld, since personal rights are superior to property rights, and their violation a more serious matter. *State ex rel. v. Anderson*, 533.
7. ———: ———: **Based Upon Inherent Relationship of Employment.** Since the law requires the employer to furnish his employees a reasonably safe place in which and reasonably safe appliances with which to work, and a violation of either duty is a basis for a legal action for damages for personal injury to the employee, the law must either impose an implied agreement upon the employer, arising out of the contractual relation, that the employee, in case of injuries due to failure to provide such safety, shall have the right, at a proper time, in a reasonable manner and in company with proper persons, to visit and inspect such place and appliances, in order that they may testify as to their condition, or the law should expressly impose upon the employer the duty to expose to the injured employee and his experts, at a proper time and in a reasonable manner, the place where and the tools by which he was injured. *Ib.*
8. **Constitutional Question: Appeal: Transfer to Court of Appeals.** If the constitutional question was neither timely nor otherwise sufficiently raised and the statute under which defendant was convicted of a misdemeanor has previously been adjudged to be constitutional, the case will be transferred to the proper Court of Appeals for final determination. *State v. Swift & Co.*, 694.

CRIMINAL LAW.

1. **Forgery: Counterfeiting: Trading Stamps.** Trading stamps having on them the words: "Eagle: Stamp of Value 10; Reg. in U. S. Pat. Off." do not on their face purport to be the pecuniary obligation of anybody, and the making or uttering of them does not constitute counterfeiting or forgery under Sec. 4651, R. S. 1909. *State v. Sisson*, 59.
2. ———: ———: ———: **Pecuniary Obligation.** If the trading stamps bearing the word "Eagle" do not purport to be the pecuniary obligation of any one and do not of themselves constitute a pecuniary obligation of some one, an information charging forgery cannot supply these necessary elements by charging that a private company is under agreement to pay two dollars a thousand for "Eagle Trading Stamps" when presented in a certain way. *Ib.*

DAMAGES.

1. **Damnum Absque Injuria: Overcharges for Freight Shipment: Result of Suit.** Overcharges for shipments of freight, made by a railroad company in violation of a statute during the time a suit of injunction to test the validity of the statute was pending, wherein the circuit court held the statute invalid and the Supreme Court on appeal held it to be valid, are not *damnum absque injuria*, as flowing directly from the legitimate prosecution of the

DAMAGES—Continued.

- injunction; but such overcharges paid by the shippers belong to them, and may be recovered by them from the carrier. *White v. Delano*, 16.
2. **Circuit Clerk: Negligence in Filing Bill of Exceptions.** To justify a recovery of damages against a circuit clerk and his bondsmen for his failure to properly file a bill of exceptions delivered to him by the losing party who has appealed from a judgment rendered against him in the circuit court, such losing party must show actionable negligence on the part of the clerk and consequent damages. *State ex rel. v. Turner*, 49.
 3. ———: **Filing Bill of Exceptions.** When the circuit clerk accepted and deposited with other papers in the cause in his office the bill of exceptions delivered to him by appellant to be filed, the act of filing was complete, although he failed to subscribe on the bill itself any written notation of the act of filing done by him. Such notation would have been full evidence of the fact recited by it, but the fact of filing existed independently of that particular method of proving it. *Ib.*
 4. ———: ———: **Damages for Failure to Obtain Reversal.** Notwithstanding the fact that the Court of Appeals, to which defendant appealed from a judgment rendered against it in the circuit court, held that no bill of exceptions had been filed and affirmed the judgment upon a consideration of the record proper only, and defendant afterwards paid that judgment, defendant cannot recover in a suit for damages against the circuit clerk and his bondsmen for negligently failing to file such bill of exceptions, if the bill was delivered to the clerk within the time fixed by the order of the court, and he accepted it and placed it among the papers in the cause in his office, for the act of filing was complete, although the clerk did not mark it filed and made no entry on the court record showing it had been filed. [Approving *State ex rel. Railroad v. Turner*, 177 Mo. App. 1 c. 464, and disapproving *Callier v. Railroad*, 158 Mo. App. 249.]
Held, by GRAVES, C. J., dissenting, with whom WALKER and WOODSON, JJ., concur, that the general rule that the deposit of a bill of exceptions with the circuit clerk and an acceptance thereof by him is a filing of such bill is a rule which he cannot invoke, but is for the protection of the party depositing the bill, established in order that such party may not be injured by the negligence of the clerk; that it was negligence of the clerk not to mark the bill filed, and as he did not do that, or make any entry on the court records showing its filing, the record could not be corrected by a *nunc pro tunc* entry, and the Court of Appeals was authorized in holding the record showed no filing of the bill; and the clerk should be held liable for damages to the extent of the judgment which defendant has been compelled to pay because of his neglect of an imposed duty. *Ib.*
 5. **Sec. 5425: Suing for Only \$2000.** The language used in Sec. 5425, R. S. 1909, namely, that defendant "shall forfeit and pay as a penalty the sum of not less than two thousand dollars, and not exceeding ten thousand dollars, in the discretion of the jury," means that the \$2000 penalty alone, and the amount which plaintiff may recover above that sum is not penalty, but compensation for loss, which is to be established by evidence; and that being true, plaintiff may sue for \$2000 as a penalty, and for that alone, and may forego her right to compensation, if any such right she has. [Following *Boyd v. Mo. Pac. Ry. Co.*, 249 Mo. 1 c. 126.] *Johnson v. C. M. & St. P. Ry. Co.*, 418.

DAMAGES—Continued.

6. ———: ———: **Constitutionality.** Since the statute itself fixes the penalty plaintiff may recover at \$2000, it is not to permit her to fix the penalty and therefore to render the statute unconstitutional, to permit her to sue for \$2000 as a penalty alone and to forego any demand for compensation. *Johnson v. C. M. & St. P. Ry. Co.*, 418.
7. **Tort: Messenger Boy: Right to Street.** A messenger boy sent out by a telegraph company to deliver a telegram does not travel on the street by permission of the company, but in the exercise of a valuable public right; that right is a part of his own equipment for the service in which he engaged; and for his torts, committed in playfulness in no wise connected with the performance of his work or inconsistent with the terms of his employment, the company is not liable. *Phillips v. W. U. Tel. Co.*, 676.
8. ———: ———: **Running Into Pedestrian.** A messenger boy with a telegram in his hand ran along the sidewalk on which plaintiff was standing, and coming up to a newsboy with a bundle of papers under his arm asked him for a paper, and being refused snatched one from the bundle and ran, and looking over his shoulder as he ran collided with plaintiff with such force as to knock her ten feet into the street and seriously injure her. *Held*, that the telegraph company was not liable in damages for the tort.
Held, by WOODSON, J., dissenting, that the same rule of law applies as would apply if the injury had been inflicted by the telegraph company's automobile instead of the messenger boy's body coming into negligent collision with plaintiff; that he was performing the master's business at the time the injury was inflicted, and had he not been so engaged he would not have committed the tort, and the mere fact that he side-stepped a few feet from his journey to gratify some personal desire does not change the rule. *Ib.*

DIVORCE.

1. **Verification of Petition: Jurisdiction.** Unless the petition for divorce is accompanied by the affidavit required by the statute, the court acquires no jurisdiction of the case. *Robertson v. Robertson*, 137.
2. ———: **Unsigned Affidavit.** An unsigned affidavit is no affidavit at all, and where the statute requires an affidavit to accompany the petition, the court does not obtain jurisdiction unless the accompanying affidavit is signed by the proper party. And a divorce decree entered by default upon a petition to which an unsigned affidavit is attached, is void; and especially should an unsigned affidavit in a divorce case be held to be no affidavit at all, because many of the statements which the statute requires the affidavit to include can be known by the petitioner alone, and courts are too often imposed upon in such cases. *Ib.*

DRAINAGE DISTRICT.

1. **Municipal Corporation.** A drainage district is a municipal corporation, and must be provisionally incorporated as such before any step can be taken looking to the drainage of land embraced therein. *In re Drainage Dist., Buschling v. Ackley*, 157.
2. **Appeal.** The right of appeal from a decree incorporating any municipal corporation is limited. *Ib.*

DRAINAGE DISTRICT—Continued.

3. **Property Rights Affected by Incorporation.** That a person or his property has been included in a drainage district in no manner affects his rights, provided his property has not been benefited or damaged. *Ib.*
 4. **Right to Appeal: For What Things Authorized.** Notwithstanding the statute (Laws 1913, sec. 116, p. 241) says that "any person may appeal from the judgment of the court" in a drainage district case, the subsequent words of the statute limit the inquiry of the appellate court (1) to the compensation allowed for property taken and (2) to the damages allowed for property prejudicially affected by the improvement. It is the taking or damaging of property, and not the incorporation of the district, that affects the owner's rights and authorizes his appeal. *Ib.*
 5. ———: **Incorporation.** Objectors are not entitled to an appeal from the judgment of the circuit court incorporating a drainage district, if the court has jurisdiction of the subject-matter. *Ib.*
 6. ———: ———: **Raised in Suit on Tax Bill.** Whether a drainage district has been legally incorporated or not can be raised in a suit on the tax bills. *Ib.*
 7. ———: **Incorporated for Unauthorized Purpose.** There is a wide difference between a drainage district and a levee district; and while the question of whether a district organized as a drainage district was in fact a levee district may be properly raised on an appeal from a decree incorporating it, since lack of jurisdiction of the subject-matter may be shown in any suit involving it, yet the better practice is to raise the question of legality of incorporation in the suit on the tax bills. [Distinguishing Birmingham Drainage District v. Milwaukee Ry. Co., 266 Mo. 60, and Elsberry Drainage District v. Harris, 267 Mo. 139.] *Ib.*
 8. ———: **General Statute Inapplicable.** The general statute governing appeals does not apply to a drainage district case. The proceeding in such case is purely statutory, and there can be no appeal unless the drainage act, which is a complete code unto itself, authorizes it. *Ib.*
 9. ———: **Why Appeal from Judgment of Incorporation is Not Allowed.** The decree incorporating a drainage district is preliminary, informal, tentative and conditional and not a final decree adjudicating any one's rights from which an appeal will lie. *Ib.*
 10. **Additional Assessments to Meet Bonds: Power of County Court.** A drainage district organized under the County Court Act of 1905 and previous acts has no power, even though the benefits reported were in excess of the assessments and the aggregate assessments were less than the bond issue, to subsequently increase the assessments so as to raise enough money to pay the bonds and interest in full as they accrue, but under the then statute exhausted its powers when it made its first assessment. *State ex rel. v. Redman*, 465.
 11. ———: ———: **Subsequent Statute Giving Power: Effect on Meaning of Prior Statute: Legislative Construction.** Even if it be true that the Act of 1913, Laws 1913, pp. 274, 281, made specific provisions for an additional levy of assessments to pay debts of a drainage district and such act be considered a legislative construction to the effect that no such power previously existed, that would be only persuasive, and the power to levy additional assessments must still be found in the previous law under which the district was organized, for the Act of 1913 is not retroactive. *Ib.*
- 270 Mo.—47.

DRAINAGE DISTRICT—Continued.

12. ———: **Final Judgment: Reopening.** The Act of 1905, Laws 1905, pp. 185, 187, contemplated that the charges against all the tracts of land in the drainage district organized in the county court would be large enough to pay the costs of the improvement, including the bonds; but it also contemplated but one action by the court, and that in said action, after the report of the viewers and engineers and its modification upon exceptions filed by land owners, the court's order sustaining the report as modified would become a final judgment, unless appealed from and reversed; and being final, whether the amount was too small or too large, it was still a finality as to the land owner, and could not be corrected or the assessments increased years afterwards when it was discovered that the assessments were not equal to the bonds issued and will not yield enough money to pay the bonds. The law contemplated but the one action by the county court. *State ex rel. v. Redman*, 465.

DUE PROCESS OF LAW. See Constitutional Law, 3.

DURESS.

1. **Payment of Taxes.** If the law prohibited the corporation from continuing its business unless it possessed a manufacturer's license, and made each day's continuance of its business without such license a separate offense punishable by heavy fine, and forbade the collector to issue a license until the illegal taxes were paid, and required the collector to prosecute the corporation for continuing its business without such license, a payment of the taxes, under protest, to avoid prosecution and to obtain a right to continue its business, was a payment under duress. *State ex rel. v. Reynolds*, 589.
2. ———: **Property Right.** A corporation's potential existence depends on its ability to transact the business for which it was incorporated, and this is a property right; and if a failure to pay illegal taxes will, because of the penalties and inhibitions which the laws impose, prevent a continuance of that business, a payment, to avoid prosecution and to acquire the right to continue the corporate business without molestation, will constitute payment under duress. *Ib.*
3. ———: **Threats: The Law Itself.** If the law under which the license collector was demanding the tax and proceeding to enforce its collection provided that it should "be his duty to prevent any person carrying on any business, object or calling for which such license or license tax is required, without having a license or license receipt for that purpose" and that he should "report to the police court of such city all violations of law or ordinances relating to license and license taxes" and further provided that no manufacturer should continue his business without such license and if he did so he should be liable to a fine of \$500 for each day's continuance, the law itself, coupled with the collector's demand that the manufacturer pay the tax as a final and absolute condition to the issuance of the license, constituted a threat to put the manufacturer out of business unless he paid the tax. *Ib.*
4. ———: **Remedy: Dictated by Defendant.** It does not lie in the mouth of the defendant who has through duress extorted an illegal tax from a manufacturer as the price of his continuing in business, to contend, when the manufacturer sues to recover the amount of the tax thus paid under protest, that his remedy was by writ of mandamus to compel the granting of license upon tender

DURESS—Continued.

of the tax; for, one who uses his extraordinary powers for purposes of extortion is not privileged to dictate the particular remedy which his victim shall choose from among those which the law affords. *Ib.*

5. ———: ———: **Common Law a Mantle of Justice.** Remedial justice extends itself like a mantle over those things that come within the reason of the law; and when legislative ingenuity devises new plans for the enforcement of its enactments, the common law automatically extends corresponding protection to those who obey them. *Ib.*
6. ———: ———: **State as Extortioner.** If the State proceeds by methods of its own making calculated to compel the taxpayer to yield, whether right or wrong, to avoid an overpowering injury, it has no right to complain if, having the bone of contention in its own possession, it must try the right to it on equal terms. *Ib.*
7. **Payment of Illegal Taxes: Recovery From Collector.** A suit against the city collector, who is the agent of the State in collecting State taxes, to recover back the amount of a State tax illegally demanded and paid to him under duress, cannot be maintained, if he has already transmitted it to the State Treasury. The Legislature alone can give relief in such circumstances. The rule is that where money illegally collected by color of law still remains in the hands of the collector it may be recovered from him by the party paying it; but if it has been paid over by the collector to the proper authorities, he is no longer responsible for it, though it appears he acted under an authority which was void. *Ib.*

EAGLE TRADING STAMPS. See *Forgery*, 1 and 2.

EJECTMENT.

1. **Former Default Judgment as Bar.** If a former default judgment adjudging plaintiff to be the owner of the land and forever enjoining defendants from asserting any title thereto is valid, it forever precludes defendants from introducing evidence of title in them at any time prior to its rendition. *Phillips v. Broughton*, 365.
2. **Former Judgment Void Because of Insufficient Prayer: Sec. 2092, R. S. 1889, and Sec. 2100, R. S. 1909.** If the only relief prayed for in the petition in the former action begun in 1908 was that "the defendants may be summoned to show cause why they should not bring an action to try their alleged claim or title thereto, if any they have," the default judgment adjudging plaintiff to be the owner of the land and forever enjoining defendants from asserting title thereto was void, because the petition clearly shows the action was instituted under Sec. 2092, R. S. 1889, which was repealed by the Act of 1897, Laws 1897, p. 74, and because if the judgment granted other relief than that prayed for it would not be binding upon defaulting defendants, since it is expressly provided by Sec. 2100, R. S. 1909, that in such case the relief granted "shall not be other or greater than that which he [the plaintiff] shall have demanded in the petition." *Ib.*
3. **Judgment: Responsive to Petition.** If a judgment is in all respects complete as a judgment in ejectment, it will not be held to be a decree in equity, and therefore irresponsible to the petition in ejectment, for that, in addition to those necessary recitals,

EJECTMENT—Continued.

it also recites that plaintiff is entitled to possession "for the purpose of applying the rents and profits on the debt and note" and further orders plaintiff "when said debt has been fully extinguished to turn over said premises" to defendant. These unnecessary recitals are mere surplusage. *Wilson v. Reed*, 400.

4. **Deed of Trust: After Condition Broken.** The mortgagee, after condition broken, may recover possession of the mortgaged premises by an action in ejectment, and retain such possession for the purpose of applying the rents and profits upon the principal and interest of the debt; and this applies to a trustee in a deed of trust, in whom, upon condition broken, the legal title is vested. *Ib.*

ELECTIONS.

1. **Collector of St. Louis: Elected in April, 1913.** No one could be or was legally elected to the office of Collector of the Revenue for the city of St. Louis at the April election held in 1913. Said office is a county office, and the statute (Sec. 11432, R. S. 1909; Laws 1905, p. 272) requires the Collector to be elected at the general election held in November, 1906, and every four years thereafter. *State ex inf. v. Koeln*, 174.
2. ———: **Elected for Unexpired Term: Entrance into Office.** The office of Collector of the Revenue begins in March, and the general statute provides that in case of a vacancy occurring in said office it shall be filled by appointment by the Governor and that such appointee shall hold office until March. The person elected at the preceding November election to fill an unexpired term does not take possession of the office immediately upon his election, nor until the next March, whether the Governor filled the vacancy by appointment prior or subsequent to such election. *Ib.*
3. **Contest: Jurisdiction: Waiver.** Jurisdiction of the subject-matter cannot be waived; and the circuit court does not obtain jurisdiction of an election contest unless notice is served upon contestee within the time prescribed by the statute. The contestee does not waive notice or confer jurisdiction on the court to try the contest, by duly and specifically challenging the jurisdiction and power of the court to proceed with the contest under an alleged notice, or by thereafter filing a counter notice of a contest of his own after the time for serving notice on him has expired. *State ex rel. v. Robinson*, 212.
4. ———: ———: **Service of Notice: Must be by Officer.** Notice in an election contest operates in the nature of a petition and writ in an ordinary civil action, and can be served only by the officer of the court wherein the contest is instituted. It cannot be served, any more than can a summons in an ordinary civil action, by some private person or by contestant himself. The circuit court does not obtain jurisdiction to try an election contest upon a notice served by a private person. *Ib.*
5. ———: **Interlocutory Notices: Service by Private Person.** Section 1791, Revised Statutes 1909, declaring that "service of any notice required by this chapter may be made by any sheriff, marshal or constable, or by any person who would be a competent witness," does not refer to the notice or summons which brings a party into court for the purpose of forcing him to submit to a trial, such as a defendant in an ordinary civil action or a contestee in an election contest, but refers only to interlocutory notices, that is, notices required to be given in the progress of a cause. *Ib.*

ELECTIONS—Continued.

6. ———: ———: **Posting Notice in Clerk's Office.** The failure of a private person to find contestee in an election contest will not suffice as a basis for a substituted service until the effort to get personal service has failed, and that effort must be made by an officer of the court, and cannot be made by a private person; and a posting of the notice in the office of the circuit clerk, after unavailing efforts by a private person to obtain personal service, does not bring contestee into court, and gives the court no jurisdiction to try the case. *Ib.*
7. **Voting: Two Names for Same Office.** The statute (Sec. 5909, R. S. 1909) specifically provides that if a ballot contains a greater number of names for any office than the number of persons required to fill such office, it shall be considered as fraudulent as to the whole number of names designated to fill such office. And where two constables for the same district were to be elected, the writing by 38 voters of their own names on or just under the dotted line below the printed names of the two nominated candidates for that office, made those ballots void for all three. *Turpin v. Powers*, 338.
8. ———: ———: **Writing Voter's Own Name on Ballot.** A voter has a right to vote for himself, and if he writes his name under the caption for an office, and thereby more unscratched names remain on the ballot than there are persons to be elected to that office, that ballot cannot be counted for himself or any candidate for that office. *Ib.*
9. ———: **Counting Void Ballots.** If contestant can be given the office only by counting illegal ballots for him, contestee should be awarded the office. *Ib.*

EMPLOYER AND EMPLOYEE. See *Negligence*, 32 and 33, and *Mines and Miners*.

EVIDENCE.

1. **Negligence: Methods of Locking Switches: Conflicting Evidence.** Where the evidence as to the custom of railroads in locking switches is conflicting, there being no express rule on the subject, it will not be held as a matter of law that the method employed by defendant was that adopted and practiced by railroads generally, but the question is one of fact for the jury to determine. *Thompson v. Railroad*, 87.
2. ———: **Looking for Lever in Proper Notch: Contributory Negligence.** The switchman's testimony that as the car on which he was riding passed he looked at the switch points and they were in such position against the rails as to show the switch was set for the side track, and that they could not have been in the position in which they were unless the lever was down in the notch in the switch-stand, is evidence that the switch was set for the side track and that the lever was in the proper notch as the car on which he was riding approached the switch; and it was for the jury to determine whether, in failing to see and know that the lever was set in the proper notch, he was guilty of negligence contributing to the derailment caused by the car entering upon the wrong track at the switch. *Ib.*
3. **Public Lands: Priority of Field Notes.** The field notes of United States surveys of public lands made prior to their conveyance to the State or to private persons, will control in ascertain-

EVIDENCE—Continued.

- ing corners and lines, even though the monuments established by the surveys cannot be found. *Lumber Co. v. Ripley County*, 121.
4. **Surveys: No Established Corner.** A survey which does not begin at a corner established by the Government, or a corner established as required by Sec. 11322, R. S. 1909, though it otherwise pretends to follow field notes from another corner assumed to be right, is not admissible in evidence, and cannot be used to discredit an official survey made in pursuance to an order of the circuit court under the mandate of Secs. 10184 and 10188, R. S. 1909. *Ib.*
 5. **Limitations: Thirty-Year Statute: Payment of Taxes: Alteration of Tax Book: Interpolations.** Documentary evidence such as a tax book, showing on its face circumstances of suspicion, such as writings over erasures, or the use of different inks, or interpolations, should not be received in evidence without explanation on the part of the party producing it. And that rule applies to an erasure and a change in the description of land on the tax book, where it is attempted thereby to show by the plaintiff that he paid the taxes one year out of the thirty. *Carson v. Lumber Co.*, 238.
 6. ———: ———: **Burden of Proof.** The thirty-year Statute of Limitations requires the party invoking it to show non-payment of taxes by the owner of the paramount title, but the evidence to support that negative is not required to be either other or greater in degree than that which would generate belief in the minds of the triers of the fact. *Ib.*
 7. **Objection: Raised First on Appeal.** An objection that a will, the common source of title, was not shown to have been admitted to probate, comes too late if made for the first time in appellant's brief. *Schneider v. Kloepple*, 389.
 8. **Lost Deed: Quantum of Proof: Remote Transaction.** There is no hard-and-fast rule concerning the quantum of parol proof necessary to establish a lost deed. Accuracy and detail are expected in establishing a recent transaction, and absence of them would be ground of suspicion; but remoteness necessarily affects the character of the proof, and definiteness and accuracy of detail in such case would arouse suspicion. The rule that the proof must be "clear, cogent and convincing" does not mean that the proof of the same amount of definite detail should be required in every case, without regard to remoteness or lapse of time, but depends upon the circumstances of the case, the nature of the claim, possession, assertion of ownership, etc. *Jones v. Kirk*, 408.
 9. ———: **Long Possession: Presumption.** Where there are uncontradicted facts and circumstances from which it is inferable that in 1860 the owner of a one-ninth interest in land and her husband conveyed it to another cotenant, the purchase price was paid, and the deed executed and acknowledged, and was destroyed by fire in the burning of the grantee's house during the Civil War; that said grantee conveyed two ninths interest in 1867 to a grantee who had acquired the other seven-ninths, and since said date said last grantee and those who claim under him have been in possession, claiming to be the owners, and have paid the taxes, and no assertion of title was made until long after both the original grantor and grantee were dead, it will be presumed that a deed was made in 1860 sufficient in form to convey said one-ninth interest. *Ib.*
 10. ———: ———: ———: **Legal Formalities.** The presumption from all the circumstances that a deed sufficient to convey the land was

EVIDENCE—Continued.

- executed and delivered implies that the deed was executed according to then existing formalities. *Ib.*
11. **Circuit Court: Power to Order Examination of Premises for Evidence.** The circuit courts of Missouri are courts of original and general jurisdiction, possessing practically the same powers as *nisi prius* courts in England, among which was the power to permit plaintiff and his counsel, in a civil suit against a corporation, to visit defendant's manufacturing plant, and enter upon its premises, with experts and photographers, for the purpose of inspecting and measuring the same, and making drawings and taking photographs to be used as evidence in the trial of said action; and such power was not taken away by the constitutional provisions against unreasonable search and seizure, nor is a legislative statute necessary to the exercise of such power by the court. *State ex rel. v. Anderson*, 533.
 12. ———: ———: **Invasion of Property Rights: Similar to Examination by Physicians.** The power of the court to permit plaintiff, in a personal injury action based on a charge of an unsafe place in which to work or unsafe tools, to visit the factory of the company causing the injury, with proper persons and on a proper occasion, for the purpose of obtaining photographs or drawings to be used in the trial of the case, is based on the power of the court to know the facts which determine the plaintiff's right to recover and defendant's liability, and if reasonably exercised is not an invasion of property rights, but is similar to the power of the court to compel the plaintiff suing for personal injuries to submit to an examination by physicians appointed by the court, and for a stronger reason should be upheld, since personal rights are superior to property rights, and their violation a more serious matter. *Ib.*
 13. ———: ———: **Based Upon Inherent Relationship of Employment.** Since the law requires the employer to furnish his employees a reasonably safe place in which and reasonably safe appliances with which to work, and a violation of either duty is a basis for a legal action for damages for personal injury to the employee, the law must either impose an implied agreement upon the employer, arising out of the contractual relation, that the employee, in case of injuries due to failure to provide such safety, shall have the right, at a proper time, in a reasonable manner and in company with proper persons, to visit and inspect such place and appliances, in order that they may testify as to their condition, or the law should expressly impose upon the employer the duty to expose to the injured employee and his experts, at a proper time and in a reasonable manner, the place where and the tools by which he was injured. *Ib.*
 14. **Witness: Ruling of Incompetency: No Offer of Testimony.** The ruling of the trial court that a certain witness offered by appellants was incompetent to testify will not be reviewed on appeal unless the ruling was followed by an offer to prove what the witness's testimony would be if he were permitted to testify. *Bingaman v. Hannah*, 611.
 15. **Will Contest: Subscribing Witnesses: Cross-Examination.** Where the subscribing witnesses manifest an unwillingness to testify to the mental condition of the testator at the time he subscribed the will, the trial court does not abuse its discretion by permitting proponents to cross-examine them, though their own witnesses, by asking them if they had not sworn in the probate court, upon the original probate of the will, that testator was of sound mind at the time he signed the will. *Ib.*

EVIDENCE—Continued.

16. **Interstate Shipments: Established Rates.** A stipulation in the agreed statement of facts that the rates charged and paid by the shipper were the "regular, published tariff rates" is evidence that the rate the shipper paid was the "legally established and published rate" and sufficient in an action arising on account of a discrimination in violation of the Interstate Commerce Act, although there was no evidence that the rates were filed with the Interstate Commerce Commission and posted. *Lumber Co. v. Railroad*, 629.

EXECUTION.

- Judgment: Execution After Ten Years.** Execution cannot issue in any case after the expiration of ten years from the date the unrevived judgment was rendered. *Kansas City v. Field*, 500.

EXTORTIONER. See *Duress*.**FORFEITURE.**

1. **Abandonment of Franchise by Non-User.** The right or franchise granted to a company to build a railway on a named street, unused for twenty-four years, is to be considered as abandoned by the company; and the Public Service Commission is not authorized by reason of the original grant to direct the company in regard to its exercise. [On Motion to Modify Opinion.] *State ex rel. v. Public Service Comm.*, 429.
2. ———: **Judicial Forfeiture.** The consent of the city to the occupancy of its streets by a railway company is not technically a contract, but a privilege or license, and being such and being unused for such a length of time as to constitute an abandonment, a judicial proceeding to effect its forfeiture is not necessary. [On Motion to Modify Opinion.] *Ib.*

FORGERY.

1. **Counterfeiting: Trading Stamps.** Trading stamps having on them the words; "Eagle: Stamp of Value 10; Reg. in U. S. Pat. Off." do not on their face purport to be the pecuniary obligation of anybody, and the making or uttering of them does not constitute counterfeiting or forgery under Sec. 4651, R. S. 1509. *State v. Sisson*, 59.
2. ———: ———: **Pecuniary Obligation.** If the trading stamps bearing the word "Eagle" do not purport to be the pecuniary obligation of any one and do not of themselves constitute a pecuniary obligation of some one, an information charging forgery cannot supply these necessary elements by charging that a private company is under agreement to pay two dollars a thousand for "Eagle Trading Stamps" when presented in a certain way. *Ib.*

FRANCHISE.

1. **Abandonment by Non-User.** The right or franchise granted to a company to build a railway on a named street, unused for twenty-four years, is to be considered as abandoned by the company; and the Public Service Commission is not authorized by reason of the original grant to direct the company in regard to its exercise. [On Motion to Modify Opinion.] *State ex rel. v. Public Service Comm.*, 429.
2. ———: **Judicial Forfeiture.** The consent of the city to the occupancy of its streets by a railway company is not technically a contract, but a privilege or license, and being such and being unused for such a length of time as to constitute an abandonment, a

FRANCHISE—Continued.

judicial proceeding to effect its forfeiture is not necessary. [On Motion to Modify Opinion.] *Ib.*

FRANCHISE FOR WATER SUPPLY. See **Public Utilities.**

FREIGHT RATES. See **Railroads.**

GOVERNOR. See **Appointment.**

HOMESTEAD.

1. **Money in Lieu of Dwelling.** The existence of the home, and not the money which represents its value, is the foundation of the homestead statutes. They refer only to the dwelling house for the family and the surrounding soil from which the sustenance of the home is to spring. *Dalton v. Simpson*, 287.
2. **In Partition: Governed by Section 6713: Power of Court.** Since the Partition Act is silent as to homesteads, resort must be made to section 6713, Revised Statutes 1909, which is a part of the Homestead Statute, whenever lands in which a homestead exists are brought into partition. Under that statute the only power the court has is to sever it from the balance of the real estate sought to be partitioned. *Ib.*
3. —: **Section 6714.** The Legislature meant, by Sec. 6714, R. S. 1909, which authorizes the sale of the homestead in certain contingencies and which is the only provision of law by which it is possible for the courts to deprive the widow and minors of their homestead, to guard their rights with care. It cannot be used as a device by which adult heirs and other plaintiffs in partition may swallow the homestead or extinguish it by relegating the widow and minors to the value of the homestead or to the net income arising from such value. *Ib.*
4. **Not Subject to Partition.** A homestead as such is not subject to partition. If it can be severed and set apart from the rest of the real estate, it cannot be sold at the partition sale. *Ib.*
5. **Partition: Severance and Subsequent Sale of Homestead: Bill of Exceptions.** Where the proceedings in a partition suit have been regular up to the time the report of the commissioners appointed to admeasure and set off the homestead has been filed, the court cannot thereafter order the homestead sold and the value thereof placed in the hands of a trustee for the use of the widow and minors; and if such an order is embodied in a judgment subsequently rendered ordering distribution, it as well as the judgment are for review on appeal, as matters of record proper, and a bill of exceptions is not necessary. *Ib.*

HUSBAND AND WIFE.

1. **Conveyances: Equitable Title: From Husband to Wife: Statute of Uses.** If the estate vested in the wife by a deed directly to her from her husband, made prior to the Married Woman's Act, remained in her until after his death, the Statute of Uses upon his death executed the dry trust, and her deed thereafter conveyed the legal title. *Carson v. Lumber Co.*, 238.
2. **Life Insurance: Surrender for Paid-Up Policy: Separate Estate of Wife.** The statute (Sec. 6944, R. S. 1909) which provides that an insurance policy made payable to the wife of the insured "shall inure to her separate benefit, independently of the creditors" of

HUSBAND AND WIFE—Continued.

the husband, was designed to make whatever should come to her upon the payment of the insurance her separate estate and to exempt it from the claims of the creditors of her deceased husband; it does not inhibit the husband from surrendering a policy which names her as beneficiary, and accepting a paid-up policy in lieu thereof. *McKinney v. Ins. Co.*, 305.

INDEBTEDNESS OF COUNTY. See *Constitutional Law*, 25 and 26.

INDICTMENT AND INFORMATION.

Forgery: Trading Stamps: Pecuniary Obligation. If the trading stamps bearing the word "Eagle" do not purport to be the pecuniary obligation of any one and do not of themselves constitute a pecuniary obligation of some one, an information charging forgery cannot supply these necessary elements by charging that a private company is under agreement to pay two dollars a thousand for "Eagle Trading Stamps" when presented in a certain way. *State v. Sisson*, 59.

INHERITANCE TAX.

1. **On Annual Income.** A bequest of an income for life, or till the legatee's divorce and remarriage, payable annually in monthly installments by a trustee in such sums as he shall deem advisable and just, out of an estate devised in trust for that sole purpose, is not subject to a collateral inheritance tax under Secs. 309-331, R. S. 1909. In re *Estate of Clark*, 351.
2. ———: **Vested Estate: Contingency.** If property is bequeathed to a trustee with directions to pay annually to a named legatee such a part of the income as the trustee deems advisable and just, the bequest vests and takes effect in immediate possession; and therefore Sec. 314, R. S. 1909, which provides that if the estate be one wherein possession is postponed or contingent the collateral inheritance tax shall not be due until the beneficiary obtains possession of the property, does not impose a tax upon a vested income. *Ib.*
3. ———: ———: **Indefinite Amount.** If the amount of income which the legatee will annually receive is impossible of ascertainment, Sec. 310, R. S. 1909, affords no basis for the imposition of a collateral inheritance tax. *Ib.*
4. ———: ———: **Appraisement.** Since Secs. 322 and 323, R. S. 1909, require the property to be appraised "at its clear market value at the time of the death of decedent," those sections afford no basis for imposing a collateral inheritance tax upon an annual income vested in *praesente* whose amount is indefinite in that it is to be whatever sum the trustee may deem advisable and wise. *Ib.*
5. ———: ———: ———: **Amount and Duration.** To determine the present value of any limited estate, income or annuity, both the annual amount and the duration thereof must be known; or, the amount must be known and the duration be capable of being averaged by the mortality tables. *Ib.*
6. **Statutes: Construction.** Taxation statutes are to be strictly construed, but not so far or so technically as to defeat the intention of the Legislature. But if it cannot be said from an examination of them that the Legislature intended to impose a tax on incomes of a certain sort, an attempted taxation of them cannot be upheld. *Ib.*

INHERITANCE TAX—Continued.

7. ———: **Ascertainment Each Month.** To hold that the statutes provide for an ascertainment of the tax due each month from an annual income, to be paid in monthly installments, where the trustee is by the bequest to determine how much will be paid each month, is to give a violent construction to the statute, and one not warranted by its terms. *Ib.*

INJUNCTION.

1. **Penalty Pendente Lite: Violation of Freight Law.** The penalty of treble damages imposed by the Maximum Freight Rate acts of 1905 for an overcharge by a railroad company for the carriage of commodities was suspended during the pendency of the injunction suit brought by the carrier to enjoin the enforcement of the acts on the ground that the maximum rates fixed by them were confiscatory. *White v. Delano*, 16.
2. ———: ———: **Constitutional Right.** The constitutional right of any person whose property or liberty is affected by a statute to bring a suit to test its validity would be impaired and invaded if the penalties imposed by the statute for its violation could be inflicted upon him for violations of the statute during the pendency of a suit brought in good faith. *Ib.*
3. ———: ———: **Right to Sue: Due Process.** The right to sue and defend in the courts is one of the highest and most essential privileges of citizenship, and a statute which imposes on a citizen penalties for bringing a suit to establish his constitutional rights, or that imposes a penalty for its violation during suit pending, would deny to him due process of law, for it would impair his constitutional right to "certain remedy for every injury to person, property or character." *Ib.*
4. **Suspension of Statute Pendente Lite: Overcharge of Freight Rates.** The Maximum Freight-Rate statutes of 1905, held to be invalid by the circuit court, but to be valid upon appeal to the Supreme Court of the United States, were not, as to the freight rates fixed by them nor as to overcharges, suspended during the pendency of the appeal. *Ib.*
5. **Damnum Absque Injuria: Overcharges for Freight Shipment: Result of Suit.** Overcharges for shipments of freight, made by a railroad company in violation of a statute during the time a suit of injunction to test the validity of the statute was pending, wherein the circuit court held the statute invalid and the Supreme Court on appeal held it to be valid, are not *damnum absque injuria*, as flowing directly from the legitimate prosecution of the injunction; but such overcharges paid by the shippers belong to them, and may be recovered by them from the carrier. *Ib.*
6. **Public Nuisance: Selling Liquors.** Injunction cannot be used to restrain the sale of beer in a county which has adopted the Local Option Law unless the seller has been guilty of aiding and abetting the commission of a public nuisance. *State ex rel. v. Brewing Co.*, 100.
7. ———: ———: **Pleading.** The petition for an injunction to restrain the selling of intoxicating liquors must specifically set out the facts constituting the public nuisance. The mere statement of legal conclusions is not sufficient. *Ib.*
8. ———: ———: **Statement of Cause of Action.** A petition for an injunction charging that defendant from its brewery in

INJUNCTION—Continued.

Illinois daily sells and ships into a Missouri county in which the Local Option Law is in force, to divers persons, large quantities of beer; that it has been so selling and shipping for a long time, and will continue to do so unless restrained therefrom, does not state the semblance of a cause of action, because (1) the statute (Sec. 7228, R. S. 1909) authorizes any person in such county to order liquor for his own and his family's use where it is sent directly to him, (2) the brewer is authorized to sell beer in Illinois to such a person, and (3) in the absence of any charge to the contrary it cannot be presumed that the brewer was violating any law in shipping beer to persons in said county. *State ex rel. v. Brewing Co.*, 100.

9. ———: ———: **Public Nuisance: Aiding Sales.** And a petition which further charges that by reason of such shipments divers persons are enabled to sell, barter and give away said beer in said county, contrary to the Local Option Law; that by reason thereof said Illinois brewer is assisting and enabling such persons to sell beer in said county by retail and thereby maintaining a public nuisance, fails to state any facts which even remotely tend to show that the defendant brewer violated any law in selling said beer in Illinois, or assisted by such sale in establishing a nuisance in said county. *Ib.*
10. ———: ———: ———: **Turbulent Crowds: Scienter.** And averments in said petition that by reason of the sale of beer in said local-option county large crowds of idle and turbulent people assemble at the places where such beers are kept and sold, to the great injury of society and the general welfare of the people of the county, without naming the vendors or the places where the beers are sold, and without charging that the defendant or any of his agents knew or knows of the congregation of said idle and turbulent persons, does not charge facts sufficient to show that the defendant brewer in Illinois is maintaining a public nuisance in said county. *Ib.*
11. ———: **Crime.** The congregation of divers idle and turbulent persons in secret places where intoxicating liquors are sold and drunk may constitute a crime; but a brewer, who is not charged with knowledge of their turbulent character or of their assembling and drinking in such secret places, is not maintaining a public nuisance by the mere fact that the beer sold at his Illinois brewery enables divers persons to sell it in such Missouri town. *Ib.*

INSTRUCTIONS.

1. **Negligence: Vigilant Watch Ordinance: Not in Abstract.** Whether or not an instruction permits a recovery against a street railway company if the conductor of the car failed to keep a vigilant watch for vehicles on the track, in violation of a city ordinance, and is for that reason erroneous, or whether or not the ordinance applies only to motormen, will not be decided, if the ordinance is not preserved in the printed abstract. Courts cannot take judicial notice of municipal ordinances, however great the municipality. *Peterson v. United Rys.*, 67.
2. ———: **Ringing Bell or Sounding Gong: Proximate Cause.** Where both plaintiff and his driver saw and knew of the approaching street car when it was six hundred feet from the place where their automobile was stalled on the track, the failure to give notice of the approach of the car by sounding the gong or otherwise was not the proximate cause of plaintiff's injury caused by

INSTRUCTIONS—Continued.

the street car striking the automobile, and an instruction basing his right to recover upon such failure is error. The purpose of sounding the gong is to give notice of the car's approach, and if the injured party on the track has actual timely knowledge of its approach, without such sounding, failure to sound the gong cannot be the proximate cause of his injury. *Ib.*

3. **Negligence: Absolute Safety.** An instruction which required the jury to find that the switch-stand where the car left the track was negligently maintained without a lock and that such switch-stand without a lock was not a reasonably safe place—if another instruction defined negligence as “a want of ordinary care” and then properly defined those words—did not require a verdict for the injured switchman unless the switch was absolutely safe. *Thompson v. Railroad*, 87.
4. ———: **No Requirement of Conformity to Custom: Non-Direction.** Sufficient proof of usage in the matter of locking a switch and of conformity to custom, may be said to rebut the idea of negligence in a proper case; and an instruction which excludes the idea that the jury should consider the evidence tending to show the railroad company's practice in leaving the switch unlocked conformed to the usage of well managed lines, would be erroneous; but an instruction which contains no particular direction, but does require a finding of negligence, does not exclude the consideration of such evidence, but amounts only to non-direction, which may be supplied or covered by instructions for defendant. *Ib.*
5. **Negligence: Should.** The use of the word should, used in an instruction in which the jury are told that, if they find certain facts, they “should” return a verdict for plaintiff, is not objectionable. It imports duty or obligation; and is therefore appropriate to advise the jury of their duty. *Kippenbrock v. Railroad*, 479.
6. ———: **Contributory Negligence as Diminution of Damages: In Language of Statute.** In an action brought under the Federal Employers' Liability Act, an instruction telling the jury, if they find certain facts, to return a verdict for plaintiff, “even if you should find him guilty of negligence contributing to the injury, but in that event the damages should be diminished by you in proportion to the amount of negligence attributable to plaintiff,” using the language of the statute, uses a formula that is exempt from criticism. But whether an instruction explaining the statutory language should have been given, is not decided, because none such was asked, and the question is not in the record. *Ib.*
7. **Will Contest: Subscribing Witnesses: Instructions: Knowledge of Testator: Presence.** The instructions should clearly convey to the jury the idea that in order to find that the will was properly witnessed they should find that it was signed by subscribing witnesses in the presence of the testator and with his knowledge and consent. The word “presence” necessarily includes knowledge of the act and acquiescence therein by the testator, and they can be shown in different ways, namely, by his verbal request, or by any act or conduct upon his part, or by any other evidence which would show that he had knowledge of the attestation and consented to or acquiesced therein. *Bingaman v. Hannah*, 611.
8. **Broader Than Pleading or Evidence.** An instruction cannot be broader than the pleadings, nor broader than the facts proven; it must be within the purview both of the pleadings and the evidence. *State ex rel. v. Ellison*, 645.

INSTRUCTIONS—Continued.

9. ———: **Mining: Place of Danger.** Where the miner was working at removing roof supports that had been left when the rooms of the mine were "turned," and his petition is drawn on the theory that at a point in the mile-long entry fifteen to twenty-five feet from his working place his master had permitted a bad roof to remain, and he had gone to that point to eat his dinner, not knowing it was unsafe, and was killed by the falling of the fragile roof, an instruction which permits a recovery if a large slab of rock fell from the roof of "one of the main entries," without limiting the point of injury to the place in the entry at which the petition charges the negligence was, is broader than the pleadings, and a verdict cannot be upheld on the theory that the error was harmless. *State ex rel. v. Ellison*, 645.
10. ———: **Harmless Error.** If evidence assuming a broader field than the pleadings is erroneously admitted, instructions based upon such evidence which are broader than the pleadings cannot be held to be harmless. That course would require defendant to meet an issue of which the petition did not give him notice. *Ib.*
11. ———: ———: **Certiorari: Quashing Opinion of Court of Appeals.** The Court of Appeals cannot preclude a review by the Supreme Court of an instruction that is broader than the pleadings by merely saying it is harmless. *Ib.*
12. **Conflicting.** An instruction for plaintiff authorizing a recovery if a loose slab of rock fell from the roof of "one of the main entries of defendant's mine" and crushed the miner, is in direct conflict with a correct instruction given for defendant telling the jury, in the language of the petition, that they must find the roof fell at a point fifteen to twenty feet from his working place; and by repeated decisions it has become the established rule of law in this State that if two instructions conflict and the one given for appellant is right under the law, the giving of the one for plaintiff is error, for which a judgment for him must be reversed. *Ib.*
13. **Damages: Aggravation.** An instruction telling the jury that, if they find for plaintiff in the action for the negligent killing of her husband, they will allow her a sum not to exceed \$10,000, in their discretion, etc., and "you may also take into consideration the facts constituting negligence on the part of the defendant causing the death," was erroneous, first, because there were no aggravating circumstances shown and the instruction was therefore broader than the evidence; and, second, the petition did not plead such a case, and the instruction therefore broadened the issues. *Ib.*

INSURANCE.

1. **Change of Beneficiaries: By Contract.** A provision inserted in a policy belonging to the class of insurance wherein the rights of the beneficiaries are vested, which entitles the insured to change them and to divest them of its proceeds, is as broad as its terms and no broader, and must be construed according to the terms expressing it in a given case. *McKinney v. Insurance Co.*, 305.
2. ———: **To What Insurance Applicable.** The right to change the beneficiary named in a policy, whether as an incident to fraternal-beneficiary insurance or as one resting in contract expressed in an ordinary-life policy, is equally efficacious, and the power to exercise it is measured by the language on which it is founded. Whether the right arises by convention or from the nature of the insurance, the beneficiary to be affected by its exercise has a con-

INSURANCE—Continued.

ditional interest only in the policy proceeds, while the power to change such beneficiary continues to exist. Ib.

3. ———: **Only Incidentally Applicable.** Where no change was made in the beneficiaries designated when the policy was issued, the terms of the provision authorizing the insured to change them need not be considered further than as affording incidental support for what was actually done by the insured in the delivery to him of a paid-up policy upon a surrender of the original policy. Ib.
4. **Statutes as Part of Contract.** The statutes governing the business of a foreign insurance company licensed to do business in this State are as much a part of an ordinary-life policy written by it as if the language of the statutes had been inserted in the policy as a part of the agreement of the parties. Ib.
5. **Surrender for Paid-Up Policy: Without Consent of Beneficiaries: Legal Holder.** Since the statutes say that the "legal holder" of a non-forfeitable ordinary-life policy may demand a paid-up policy for an amount computed by a statutory plan, and that the "legal holder" of the policy may himself surrender the policy and thus avoid its self-enforcing provisions for extended insurance, the insured, who within the meaning of such statutes is the "legal holder," may, without the consent of the beneficiaries, surrender a policy upon which he has paid three or more annual premiums, and in lieu thereof receive a paid-up policy for the statutory sum, and that sum being both in accordance with the statute and the stipulations of the policy the company by paying it may be discharged from any further obligations under the policy. Ib.
6. ———: **Separate Estate of Wife.** The statute (Sec. 6944, R. S. 1909) which provides that an insurance policy made payable to the wife of the insured "shall inure to her separate benefit, independently of the creditors" of the husband, was designed to make whatever should come to her upon the payment of the insurance her separate estate and to exempt it from the claims of the creditors of her deceased husband; it does not inhibit the husband from surrendering a policy which names her as beneficiary, and accepting a paid-up policy in lieu thereof. Ib.

INTERSTATE COMMERCE.

1. **Interstate Shipments: Governed by U. S. Laws.** The liability of a common carrier upon contracts concerning interstate shipments is governed by the Interstate Commerce Act and amendments thereto; and the construction of that act by the Federal courts is conclusive upon State Courts. *Lumber Co. v. Railroad*, 629.
2. ———: **Bonus or Refund on Interstate Shipments for Increase in Business.** A contract between a lumber company, about to locate large mills, and a railroad company desiring to have them located upon its lines in order that it might receive the manufactured lumber for shipment and the increase in traffic which would result from the building up of a new town, by which the railroad company agreed in consideration of the erection of the mills at a designated point on its lines, to give to the lumber company an amount equal to half of the freight charges received by the railroad on interstate shipments of machinery and materials that went into the construction of the plant, was in violation of the Interstate Commerce Act, even prior to the amendment of 1906, whether said amount to

INTERSTATE COMMERCE—Continued.

be given or paid be considered a bonus graduated on the amount of shipments done, or a refund or drawback on rates paid, or reduced rates. *Lumber Co. v. Railroad*, 329.

3. ———: ———: **Other Inducements: Promotion of Public Enterprises: Device.** The contention that the giving to a lumber company an amount of money equal to one half the freight charges received on all materials that went into the construction of its big mills in consideration of its location of its plant along the line of defendant's railroad, was not a rebate or drawback in freight rates, but merely the promotion of a public enterprise which would redound to the prosperity of the railroad, namely, the aiding in building up a town which would grow in public importance, with consequent demands for increased freight and passenger transportation, cannot be sustained, because the Interstate Commerce Act prohibits any device or indirect method of enforcing higher charges against one shipper than another, and has for its chief design the prevention of any discrimination among shippers that, by reason of rebates or drawbacks and the advantages derived from them, will enable large dealers to crush out or cripple smaller competitors who have no such advantages; and a bonus to a favored shipper is a discriminatory device. *Ib.*
4. ———: **Evidence: Established Rates.** A stipulation in the agreed statement of facts that the rates charged and paid by the shipper were the "regular, published tariff rates" is evidence that the rate the shipper paid was the "legally established and published rate" and sufficient in an action arising on account of a discrimination in violation of the Interstate Commerce Act, although there was no evidence that the rates were filed with the Interstate Commerce Commission and posted. *Ib.*

JUDGMENTS.

1. **Ejectment: Former Default Judgment as Bar.** If a former default judgment adjudging plaintiff to be the owner of the land and forever enjoining defendants from asserting any title thereto is valid, it forever precludes defendants from introducing evidence of title in them at any time prior to its rendition. *Phillips v. Broughton*, 365.
2. ———: **Former Judgment Void Because of Insufficient Prayer: Sec. 2092, R. S. 1889, and Sec. 2100, R. S. 1909.** If the only relief prayed for in the petition in the former action begun in 1908 was that "the defendants may be summoned to show cause why they should not bring an action to try their alleged claim or title thereto, if any they have," the default judgment adjudging plaintiff to be the owner of the land and forever enjoining defendants from asserting title thereto was void, because the petition clearly shows the action was instituted under Sec. 2092, R. S. 1889, which was repealed by the Act of 1897, Laws 1897, p. 74, and because if the judgment granted other relief than that prayed for it would not be binding upon defaulting defendants, since it is expressly provided by Sec. 2100, R. S. 1909, that in such case the relief granted "shall not be other or greater than that which he [the plaintiff] shall have demanded in the petition." *Ib.*
3. **Responsive to Petition: Ejectment.** If a judgment is in all respects complete as a judgment in ejectment, it will not be held to be a decree in equity, and therefore irresponsible to the petition in ejectment, for that, in addition to those necessary recitals, it also recites that plaintiff is entitled to possession "for the purpose

JUDGMENTS—Continued.

- of applying the rents and profits on the debt and note" and further orders plaintiff "when said debt has been fully extinguished to turn over said premises" to defendant. These unnecessary recitals are mere surplusage. *Wilson v. Reed*, 400.
4. **Attachment: Abatement: Entrance of Appearance: Special Tax Bills.** The judgment should not sustain an attachment sued out in the action on a special tax bill on the ground of non-residence, or adjudge the costs of the attachment against the defendant, if he enters his personal appearance to the action. *Construction Co. v. Realty Co.*, 450.
 5. **Execution After Ten Years.** Execution cannot issue in any case after the expiration of ten years from the date the unrevived judgment was rendered. *Kansas City v. Field*, 500.
 6. ———: **Special Tax Bill: City Charter: Paramount Statute.** And though the judgment was based upon a benefit assessed against a lot as its share of the cost of a public improvement and the city charter says such judgment shall be a lien until the assessment is paid, such charter provision must yield to the paramount authority of the State statute, and execution cannot issue after the period of ten years mentioned in the statute has expired. *Ib.*
 7. ———: **Matter of General Policy.** Whether an execution can be issued upon an unrevived judgment after ten years is a matter pertaining to the general laws and policy of the State, and not one relating strictly to municipal affairs or coming under municipal control. And although the judgment grows out of an assessment of the costs of a public park against lots within the benefit district, and the city charter prescribes as the method of enforcing such assessment the judgment of a court of general jurisdiction, yet that judgment, like any other of such a court, is controlled by the statute, and an execution based on it must follow the course of other executions issuing out of such courts. *Ib.*
 8. ———: **Effect of Appeal.** A judgment expires by limitation in ten years after it is rendered in the circuit court, whether appealed from or not. The statute (Sec. 1912, R. S. 1909) says that the period of ten years is to be counted "from the date of the original rendition" of such judgment. *Ib.*
 9. ———: ———: **Supersedeas.** An appeal does not stay a judgment, or stay the issuance of execution thereon. It is the *supersedeas* statute which, upon condition, stays a judgment pending an appeal upon the appellant's making and filing the requisite bond; and if a judgment be not suspended or stayed by a *supersedeas* bond, it continues, pending an appeal, in full force and vigor, and execution may issue. *Ib.*
 10. ———: ———: **Ten Years After Affirmation.** Where the judgment was affirmed on appeal on June 30, 1903, the mandate issued out of the appellate court on July 11, 1903, and was filed in the circuit court on July 12, 1903, an execution issued on July 12, 1913, was issued ten years and twelve days after the judgment was affirmed, and even if it be admitted that the statute was tolled by the appeal, and in any view of the case, the execution should be quashed. *Ib.*
 11. **Certiorari: Opinion of Court of Appeals: Judgment Right Despite Conflict.** Although the opinion of the Court of Appeals conflicts with prior rulings of the Supreme Court in certain particulars, 270 Mo.—48.

JUDGMENTS—Continued.

it will not quashed upon *certiorari* if upon good reasons in law the judgment directed by it was right. Notwithstanding the opinion of the Court of Appeals conflicted with the prior rulings of the Supreme Court in holding that the payment of the illegal tax was not made under duress, yet if it correctly decides that, whether or not duress was exercised, the tax cannot be recovered from the collector, its judgment based upon that decision will be upheld. State ex rel. v. Reynolds, 589.

JUDICIAL NOTICE.

Appeal: Facts of Former Suit. The Supreme Court takes notice of a former appeal and the record thereof, but does not notice the facts and records in one action when called upon to rule another and separate action. State ex rel. v. Eastin, 193.

JURISDICTION.

1. **Appellate Practice: Certification from Court of Appeals.** A case certified to the Supreme Court by a Court of Appeals on the ground that its decision therein is in conflict with a decision of another Court of Appeals in another case, stands for final decision and judgment, just as if it had been appealed directly to the Supreme Court from the circuit court. State ex rel. v. Turner, 49.
2. **Practice in Supreme Court: Certification from Court of Appeals.** A case certified from a Court of Appeals, upon certification that the majority opinion therein conflicts with certain cases of the Supreme Court, is for full review. Peterson v. United Railways, 67.
3. **Divorce: Verification of Petition.** Unless the petition for divorce is accompanied by the affidavit required by the statute, the court acquires no jurisdiction of the case. Robertson v. Robertson, 137.
4. ———: ———: **Unsigned Affidavit.** An unsigned affidavit is no affidavit at all, and where the statute requires an affidavit to accompany the petition, the court does not obtain jurisdiction unless the accompanying affidavit is signed by the proper party. And a divorce decree entered by default upon a petition to which an unsigned affidavit is attached, is void; and especially should an unsigned affidavit in a divorce case be held to be no affidavit at all, because many of the statements which the statute requires the affidavit to include can be known by the petitioner alone, and courts are too often imposed upon in such cases. Ib.
5. **Practice in Supreme Court: Certification from Court of Appeals.** When a case is certified from a Court of Appeals to the Supreme Court, upon the dissent and certification of one of its judges, all questions involved are for consideration in the Supreme Court, just as if the case was one appealable to this court in the first instance. Ib.
6. **Election Contest: Waiver.** Jurisdiction of the subject-matter cannot be waived; and the circuit court does not obtain jurisdiction of an election contest unless notice is served upon contestee within the time prescribed by the statute. The contestee does not waive notice or confer jurisdiction on the court to try the contest, by duly and specifically challenging the jurisdiction and power of the court to proceed with the contest under an alleged notice, or by thereafter filing a counter notice of a contest of his own after the time for serving notice on him has expired. State ex rel. v. Robinson, 212.

JURISDICTION—Continued.

7. ———: **Service of Notice: Must be by Officer.** Notice in an election contest operates in the nature of a petition and writ in an ordinary civil action, and can be served only by the officer of the court where in the contest is instituted. It cannot be served, any more than can a summons in an ordinary civil action, by some private person or by contestant himself. The circuit court does not obtain jurisdiction to try an election contest upon a notice served by a private person. *Ib.*
8. ———: **Posting Notice in Clerk's Office.** The failure of a private person to find contestee in an election contest will not suffice as a basis for a substituted service until the effort to get personal service has failed, and that effort must be made by an officer of the court, and cannot be made by a private person; and a posting of the notice in the office of the circuit clerk, after unavailing efforts by a private person to obtain personal service, does not bring contestee into court, and gives the court no jurisdiction to try the case. *Ib.*

LACHES.

1. **Neglect of Legal Title.** If the owner of a superior title with full knowledge of his rights, neglects to assert or establish them against an adverse claimant in possession, for such a length of time as to afford a presumption that they have been abandoned, or as would prevent the adverse claimant from proving his claim or title, or as would inflict an inequitable injury upon such claimant if he were ousted, then the owner of the superior title will not subsequently be aided by equity to recover the land. But if the delay of the present or previous holders of the paramount title in asserting their rights has not altered the position of the present adverse claimant or those from whom he claims, the land was submerged and not in possession of any one until recent years, the delay has not affected the documentary evidence upon which such claimant relies to show his title, and all that has been done by him has been to erect cheap buildings for the use of employees engaged in cutting timber and tillage, the paramount title has not been defeated by laches. *Carson v. Lumber Co.*, 238.
2. **City Extension: Validity.** A contention that the city limits were not legally extended to embrace the lands to be taxed with the costs of constructing a main sewer because no notice of the election was given, will not be considered, if fifteen years have elapsed since the extension was made. *Whitsett v. Carthage*, 269.

LANDLORD AND TENANT.

Lease: Parol Agreement: Part Performance: Possession. The retention of possession of land by a lessee after the expiration of his written lease, under a parol contract made by the landlord, while he was yet in possession, to lease to him for another year, will take the case out of the Statute of Frauds and authorize compulsory specific performance, only when such retention of possession is pursuant to and referable solely to the parol contract. Mere continuance of possession does not constitute part performance. Hence the expression by the Court of Appeals, in *Winter v. Spradling*, 163 Mo. App. 77, that "there would be nothing inconsistent in the defendant [tenant] holding possession under both the written and verbal leases at the same time," is condemned. *Shacklett v. Cummins*, 496.

LANDS AND LAND TITLES.

1. **Partition: Subject to Life Estate: Agreement Not to Divide.** Where three daughters to whom a mother conveyed land subject to a life estate reserved for herself, at her request, entered into a written agreement not to "ask for a division or partition," the agreement "to continue in force and be binding on each party hereto while they live," the heirs of one of the daughters who has died are entitled to have partition, subject to the life estate of the mother. The agreement should not, without good reason, be construed to bind the survivors to continue the cotenancy with the heirs of the deceased. *Flournoy v. Kirkman*, 1.
2. **Prayer and Relief: Land on an Accounting.** A supplemental bill whereby plaintiff seeks to have vested in him the title of certain land, which has been conveyed since suit was begun, and in which he prays that, if the court should find that the present record owner is a purchaser in good faith and for value, so that the plaintiff shall have no right of redemption against him, the original defendant shall be decreed to account for and pay over to plaintiff the proceeds of the property so conveyed by him since the filing of the original petition, is sufficient to entitle plaintiff to an accounting for the proceeds in the event the court could not give him the land. *Marston v. Catterlin*, 5.
3. **Outstanding Equities: Notice: Payment of Existing Mortgages.** The payment in full by the subsequent grantee of existing mortgages held by his grantor is convincing proof that the grantee did not have actual notice of a prior outstanding claim in favor of plaintiff brought about by said grantor. *Ib.*
4. ———: **Constructive Notice: Special Warranty Deed.** A purchaser by general warranty, in whose chain of title is a remote recorded deed which in effect is nothing more than a quit-claim with a special warranty covenanting against any one who might claim under the grantor therein, is not thereby, being without actual notice, chargeable with constructive knowledge of outstanding equities existing at the time the special warranty was made. *Ib.*
5. ———: ———: ———: **Grantee Under Quit-Claim.** A subsequent grantee in a general warranty deed is not prevented from occupying the position of a bona-fide purchaser, without notice, merely because some prior conveyance in his chain of title is a quit-claim or special warranty deed. In such case the general rule applicable to the grantee in a quit-claim deed, should not be applied to a grantee in a subsequent warranty deed. [*Distinguishing Mason v. Black*, 87 Mo. 329, and *Freeman v. Moffatt*, 119 Mo. 280.] *Ib.*
6. **Sheriff's Deed: Unacknowledged: Sale by Purchaser: Relation.** The grantee of the purchaser at a tax sale who conveyed by a deed recorded before the sheriff had acknowledged his deed to him, took the title, as against a subsequent grantee of said purchaser with constructive notice. As to the purchaser at the tax sale, the sheriff's deed, upon its subsequent acknowledgment, related back to the day of sale; and the purchaser's deed to his first grantee took priority over a subsequent deed made by him after his first deed and the sheriff's deed had been recorded. *Land & Mfg. Co. v. Hunter*, 62.
7. ———: **Vendible Interest.** The purchaser at a sheriff's sale acquires an interest which is vendible even prior to the acknowledgment of the sheriff's deed; and a sale by him and the title

LANDS AND LAND TITLES—Continued.

which the grantee acquires cannot be affected by subsequent attempt of such purchaser again to convey the land to another grantee; and the vendible character of his interest is not affected by the fact that after he had parted with his right to demand a deed from the sheriff the sheriff acknowledged his deed, his own deed and the sheriff's deed both being recorded before he attempted to convey to others, constructive notice being thereby given. *Ib.*

8. **Conveyance: Island in River: Not Surveyed: Reservation.** An unrestricted deed conveying land bordering on a river, or a Government patent conveying land adjacent to a non-navigable river, conveys all accretions thereto; and a patent conveying by Government subdivisions lands bordering a non-navigable river conveys all land between the meander line of the shore and the middle thread of the river, unless previous to the issuance of the patent the Government surveyed such lands as governmental subdivisions, or expressly reserved them when not surveyed. *Lumber Co. v. Ripley County*, 121.
9. **Navigable Streams: Current River: Judicial Notice.** The court takes judicial notice of what streams are navigable and what are not navigable. Current River is not a navigable water of this State, and will not be conceded to be such although appellant admits it to be in his brief. *Ib.*
10. **Public Lands: Priority of Field Notes.** The field notes of United States surveys of public lands made prior to their conveyance to the State or to private persons, will control in ascertaining corners and lines, even though the monuments established by the surveys cannot be found. *Ib.*
11. ———: **Island in Current River.** A small island of a few acres in Current River, east of the middle thread of the river, existing prior to 1821 when the Government surveyed the surrounding lands, the field notes showing meander lines running along or near the banks of the river, but neither crossing or touching the island and the survey in no wise mentioning or including but entirely ignoring it, was included in the patent of the fractional Government sub-division of the shore land on the east bank made in 1849, which did not reserve it. It was not reserved and relinquished to the State upon the admission of Missouri to the Union. *Ib.*
12. ———: ———: **Purpose of Meander Lines: Include Islands and Overflow Lands.** Meander lines run by a Government survey along or near the margin of a non-navigable stream were run for the purpose of ascertaining the exact quantity of upland to be charged for, and not for the purpose of limiting the title of the patentee to such meander lines. Low and overflow lands and small islands within the banks of such a river were included by a patent conveying the land by Government fractional sub-divisions. *Ib.*
13. **Surveys: No Established Corner.** A survey which does not begin at a corner established by the Government, or a corner established as required by Sec. 11322, R. S. 1909, though it otherwise pretends to follow field notes from another corner assumed to be right, is not admissible in evidence, and cannot be used to discredit an official survey made in pursuance to an order of the circuit court under the mandate of Secs. 10184 and 10188, R. S. 1909. *Ib.*

LANDS AND LAND TITLES—Continued.

14. **County Land: Ripley County: Sale for Fifty Cents Per Acre.** A sale of swamp land granted by the State to Ripley County in 1857, and conveyed by the county to a private citizen in 1859, was not void for that it was sold for fifty cents per acre, for the Act of January 30, 1857, Laws 1856, p. 464, provided that the minimum price for such lands lying in that county should be fifty cents an acre. [The Act of January 30, 1857, was not considered in *Bayless v. Gibbs*, 251 Mo. 492, and hence it is not an authority for a contrary ruling, and if it intended to announce a contrary ruling it is disapproved.] *Carson v. Lumber Co.*, 238.
15. ———: ———: **Transfer to Another County.** Swamp land was granted by the State to Ripley County by legislative act dated November 4, 1857, and by that county was patented to a private citizens in 1859. In 1864 the line between Ripley and Butler counties was so changed that the land was thrown into Butler. *Held*, that as the title was transferred by Ripley County prior to the change in the boundary, no title ever vested in Butler County, and defendants acquired no title based on a patent from that county. *Ib.*
16. **Conveyances: Equitable Title: From Husband to Wife: Statute of Uses.** If the estate vested in the wife by a deed directly to her from her husband, made prior to the Married Woman's Act, remained in her until after his death, the Statute of Uses upon his death executed the dry trust, and her deed thereafter conveyed the legal title. *Ib.*
17. **Laches: Neglect of Legal Title.** If the owner of a superior title with full knowledge of his rights, neglects to assert or establish them against an adverse claimant in possession, for such a length of time as to afford a presumption that they have been abandoned, or as would prevent the adverse claimant from proving his claim or title, or as would inflict an inequitable injury upon such claimant if he were ousted, then the owner of the superior title will not subsequently be aided by equity to recover the land. But if the delay of the present or previous holders of the paramount title in asserting their rights has not altered the position of the present adverse claimant or those from whom he claims, the land was submerged and not in possession of any one until recent years, the delay has not affected the documentary evidence upon which such claimant relies to show his title, and all that has been done by him has been to erect cheap buildings for the use of employees engaged in cutting timber and tillage, the paramount title has not been defeated by laches. *Ib.*
18. **Limitations: Pleading.** If there has been adverse possession for a sufficient length of time to create title, the statutes of limitations need not be specially pleaded but may be invoked under a general denial. *Ib.*
19. ———: **Swamp Lands: Sec. 7997.** The purpose of the last proviso to Sec. 7997, R. S. 1909, was to establish title by prescription in patentees of swamp land conveyed by the county court prior to 1880, who had claimed and paid taxes for more than twenty years. The act had no retroactive operation, and did not prejudice the title which had been conveyed by patent by the county to a private citizen prior to its enactment. *Ib.*
20. ———: **Thirty-Year Statute: Payment of Taxes: Alteration of Tax Book: Interpolations.** Documentary evidence, such as a tax book, showing on its face circumstances of suspicion, such as writings

LANDS AND LAND TITLES—Continued.

over erasures, or the use of different inks, or interpolations, should not be received in evidence without explanation on the part of the party producing it. And that rule applies to an erasure and a change in the description of land on the tax book, where it is attempted thereby to show by the plaintiff that he paid the taxes one year out of the thirty. *Ib.*

21. ———: ———: **Title.** The failure of the owner of the paramount title to pay taxes for thirty-two years will bar him from recovering the land from one who for many years has paid the taxes and has for seven years been in possession and claiming to be the owner under a patent from the county, which did not convey the title because it had been previously conveyed by another county at a time when it was a part of its swamp lands. *Ib.*
22. ———: ———: **Burden of Proof.** The thirty-year Statute of Limitations requires the party invoking it to show non-payment of taxes by the owner of the paramount title, but the evidence to support that negative is not required to be either other or greater in degree than that which would generate belief in the minds of the triers of the fact. *Ib.*
23. **Homestead: Money in Lieu of Dwelling.** The existence of the home, and not the money, which represents its value, is the foundation of the homestead statutes. They refer only to the dwelling house for the family and the surrounding soil from which the sustenance of the home is to spring. *Dalton v. Simpson, 287.*
24. ———: **In Partition: Governed by Section 6713: Power of Court.** Since the Partition Act is silent as to homesteads, resort must be made to section 6713, Revised Statutes 1909, which is a part of the Homestead Statute, whenever lands in which a homestead exists are brought into partition. Under that statute the only power the court has is to sever it from the balance of the real estate sought to be partitioned. *Ib.*
25. ———: ———: **Section 6714.** The Legislature meant, by Sec. 6714, R. S. 1909, which authorizes the sale of the homestead in certain contingencies and which is the only provision of law by which it is possible for the courts to deprive the widow and minors of their homestead, to guard their rights with care. It cannot be used as a device by which adult heirs and other plaintiffs in partition may swallow the homestead or extinguish it by relegating the widow and minors to the value of the homestead or to the net income arising from such value. *Ib.*
26. ———: **Not Subject to Partition.** A homestead as such is not subject to partition. If it can be severed and set apart from the rest of the real estate, it cannot be sold at the partition sale. *Ib.*
27. **Will: Life Estate With Power of Disposal: Remainder: Intention.** The language of a will was: "The real estate I bequeath to my wife Anna Maria Brink to use as she pleases, and at her death what remains is to go to the St. Joseph Catholic Orphan Asylum in St. Louis." Held, that an absolute estate in fee was not devised to Anna Maria, but the intention was, by language as clear and unambiguous as the words of creation, to create a remainder; that is, a life estate in her, with power of disposal, the remainder to vest in the Orphan Asylum. *Schneider v. Kloepple, 389.*
28. **Lost Deed: Quantum of Proof: Remote Transaction.** There is no hard-and-fast rule concerning the quantum of parol proof necessary

LANDS AND LAND TITLES—Continued.

to establish a lost deed. Accuracy and detail are expected in establishing a recent transaction, and absence of them would be ground of suspicion; but remoteness necessarily affects the character of the proof, and definiteness and accuracy of detail in such case would arouse suspicion. The rule that the proof must be "clear, cogent and convincing" does not mean that the proof of the same amount of definite detail should be required in every case, without regard to remoteness or lapse of time, but depends upon the circumstances of the case, the nature of the claim, possession, assertion of ownership, etc. *Jones v. Kirk*, 408.

29. ———: Long Possession: Presumption. Where there are uncontradicted facts and circumstances from which it is inferable that in 1860 the owner of a one-ninth interest in land and her husband conveyed it to another cotenant, the purchase price was paid, and the deed executed and acknowledged, and was destroyed by fire in the burning of the grantee's house during the Civil War; that said grantee conveyed two-ninths interest in 1867 to a grantee who had acquired the other seven-ninths, and since said date said last grantee and those who claim under him have been in possession, claiming to be the owners, and have paid the taxes, and no assertion of title was made until long after both the original grantor and grantee were dead, it will be presumed that a deed was made in 1860 sufficient in form to convey said one-ninth interest. *Ib.*
30. ———: ———: ———: Legal Formalities. The presumption from all the circumstances that a deed sufficient to convey the land was executed and delivered implies that the deed was executed according to then existing formalities. *Ib.*

LAW OF THE CASE.

1. **Different Suit.** Whether or not it be true that the law as declared by the court on one appeal continues to be law of that case upon a subsequent appeal, the rule has no application to a new and separate action. *State ex rel. v. Eastin*, 193.
2. ———: **Mandamus: Demurrer Sustained.** If it no where appears in the alternative writ that a suit by mandamus has previously been brought, and the facts of a former suit are not set forth therein, an appeal from the ruling of the trial court sustaining a demurrer to the alternative writ is not a second appeal, and hence it cannot be held that the rulings on appeal in a former mandamus case have become the law of this second suit. *Ib.*

LEASE. See *Landlord and Tenant*.

LIBEL.

1. **Statute: Applicable to Civil Cases.** The statute defining libel (Sec. 4818, R. S. 1909) is applicable in civil as well as in criminal cases. *Link v. Hamlin*, 319.
2. **Pleading: Cause of Action.** An article published in a medical journal charging that the virtue of a medical college "was sullied when an Allopath was placed on the faculty and permitted to purchase a block of its stock, and its final prostitution completed when that same Allopath secured by purchase a controlling interest;" that "this individual professed great love for Eclectic principles, was accepted into our Eclectic societies, and in every way inveigled himself into the good graces of Eclectics, with, we believe, the direct aim of destroying" the college "as an Eclectic institution;" that "this simply goes to show that you cannot change

LIBEL—Continued.

a wolf into a sheep, even if you do clothe him in a coat of wool;" and that "hence the inevitable has happened: the flock of sheep feels the fangs of the animal which could not be hidden for long," charged and was intended to charge that said "Allopath," by fraud, deceit and trickery, got possession of the college and by false representations and actions won the confidence of Eclectics, for the purpose of destroying said college as an Eclectic school; and a petition which sets forth such article, and then by apt allegations avers that it was written and published by defendant and that the charges were intended to charge plaintiff with those things and were false and maliciously made, states a cause of action. *Ib.*

3. **Demurrer to Evidence.** In passing upon a demurrer to the evidence it is the duty of the court to draw every reasonable inference from the facts proven that a jury might draw, were the case submitted to them. And where the petition states a cause of action for libel, the publication contains libelous charges and is shown to have been made by defendant, and its charges shown to be false, no demurrer to the evidence should be sustained. *Ib.*
4. **Privilege: Malice: Proof.** An assumption as true in editorial comment on a publication known to be false, shows malice. Where there is substantial testimony tending to show that the publication was libelous, that it was untrue and known to be false when published, and that after it was published or along with its publication editorials relating to the same subject and assuming it to be true were also published, the communication is not privileged, but sufficient malice is shown to carry the case to the jury. *Ib.*

LICENSE TAX. See *Taxation.*

LIMITATIONS.

1. **Cause Originating in Other State.** A cause of action originating in another State if barred in that State when instituted in this State, is by our statute (Sec. 1895, R. S. 1909) barred in this State. *Handlin v. Burchett*, 114.
2. —: **Tolling Statute: Commencement of Action.** Where the Iowa statute provides that the limitation for actions shall be extended in favor of minors, "so that they shall have one year from and after the termination of such disability within which to commence said action," the right to institute a suit cannot be confined to commence one suit only, but the minor may institute and dismiss and reinstitute his suit as many times as he sees fit within the limitation fixed by the tolling statute, which declares that "if, after the commencement of an action, the plaintiff, for any cause except negligence in its prosecution, falls therein, and a new one is brought within six months thereafter, the second shall be held a continuation of the first." The second action is declared to be a continuation of the first in order to extend the limitation statute by which it would otherwise be barred. *Ib.*
3. —: **Minor's Suit: Case Stated.** The cause of action originated in Iowa, where both plaintiff and defendant resided. On June 5, 1908, plaintiff's leg was broken and defendant treated him for the injury. Plaintiff became of age August 14, 1911, and in May, 1912, sued defendant in Iowa for malpractice, and that action was voluntarily dismissed on December 19, 1912. On August 12, 1912, he began this suit in the circuit court of Putnam County, Missouri. The Iowa statute says that such actions shall be brought within two years; that, if plaintiff fails in the first action begun,

LIMITATIONS—Continued.

he may bring a new one within six months thereafter, and "the second shall be held a continuation of the first;" and that "the times limited for actions herein shall be extended in favor of minors, so that they shall have one year from and after the termination of such disability within which to commence said action." *Held*, that this action is not barred. *Handlin v. Burchett*, 114.

4. **Pleading.** If there has been adverse possession for a sufficient length of time to create title, the statutes of limitations need not be specially pleaded but may be invoked under a general denial. *Carson v. Lumber Co.*, 238.
5. **Swamp Lands: Sec. 7997.** The purpose of the last proviso to Sec. 7997, R. S. 1909, was to establish title by prescription in patentees of swamp land conveyed by the county court prior to 1880, who had claimed and paid taxes for more than twenty years. The act had no retroactive operation, and did not prejudice the title which had been conveyed by patent by the county to a private citizen prior to its enactment. *Ib.*
6. **Thirty-Year Statute: Payment of Taxes: Alteration of Tax Book: Interpolations.** Documentary evidence, such as a tax book, showing on its face circumstances of suspicion, such as writings over erasures, or the use of different inks, or interpolations, should not be received in evidence without explanation on the part of the party producing it. And that rule applies to an erasure and a change in the description of land on the tax book, where it is attempted thereby to show by the plaintiff that he paid the taxes one year out of the thirty. *Ib.*
7. —: **Title.** The failure of the owner of the paramount title to pay taxes for thirty-two years will bar him from recovering the land from one who for many years has paid the taxes and has for seven years been in possession and claiming to be the owner under a patent from the county, which did not convey the title because it had been previously conveyed by another county at a time when it was a part of its swamp lands. *Ib.*
8. —: **Burden of Proof.** The thirty-year Statute of Limitations requires the party invoking it to show non-payment of taxes by the owner of the paramount title, but the evidence to support that negative is not required to be either other or greater in degree than that which would generate belief in the minds of the triers of the fact. *Ib.*
9. **Judgment: Effect of Appeal.** A judgment expires by limitation in ten years after it is rendered in the circuit court, whether appealed from or not. The statute (Sec. 1912, R. S. 1909) says that the period of ten years is to be counted "from the date of the original rendition" of such judgment. *Kansas City v. Field*, 500.
10. —: —: **Ten Years After Affirmation.** Where the judgment was affirmed on appeal on June 30, 1903, the mandate issued out of the appellate court on July 11, 1903, and was filed in the circuit court on July 12, 1903, an execution issued on July 12, 1913, was issued ten years and twelve days after the judgment was affirmed, and even if it be admitted that the statute was tolled by the appeal, and in any view of the case, the execution should be quashed. *Ib.*

LOCAL OPTION LAW. See *Injunctions*, 6 to 11.

MANUFACTURER'S LICENSE. See *Taxation*.

MARRIED WOMEN. See *Husband and Wife*.

MESSENGER BOY. See *Negligence*, 32 and 33.

MINES AND MINERS.

1. **Duty as to Safety.** It is the duty of the miner to keep his working place safe; it is the duty of the master to keep the entries (the places generally used by numerous miners) in a condition of reasonable safety. *State ex rel. v. Ellison*, 645.
2. **Instructions: Broader Than Pleading or Evidence.** An instruction cannot be broader than the pleadings, nor broader than the facts proven; it must be within the purview both of the pleadings and the evidence. *Ib.*
3. ———: ———: **Place of Danger.** Where the miner was working at removing roof supports that had been left when the rooms of the mine were "turned," and his petition is drawn on the theory that at a point in the mile-long entry fifteen to twenty-five feet from his working place his master had permitted a bad roof to remain, and he had gone to that point to eat his dinner, not knowing it was unsafe, and was killed by the falling of the fragile roof, an instruction which permits a recovery if a large slab of rock fell from the roof of "one of the main entries," without limiting the point of injury to the place in the entry at which the petition charges the negligence was, is broader than the pleadings, and a verdict cannot be upheld on the theory that the error was harmless. *Ib.*
4. ———: ———: **Harmless Error.** If evidence assuming a broader field than the pleadings is erroneously admitted, instructions based upon such evidence which are broader than the pleadings cannot be held to be harmless. That course would require defendant to meet an issue of which the petition did not give him notice. *Ib.*
5. ———: ———: **Certiorari: Quashing Opinion of Court of Appeals.** The Court of Appeals cannot preclude a review by the Supreme Court of an instruction that is broader than the pleadings by merely saying it is harmless. *Ib.*
6. ———: **Conflicting.** An instruction for plaintiff authorizing a recovery if a loose slab of rock fell from the roof of "one of the main entries of defendant's mine" and crushed the miner, is in direct conflict with a correct instruction given for defendant telling the jury, in the language of the petition, that they must find the roof fell at a point fifteen to twenty feet from his working place; and by repeated decisions it has become the established rule of law in this State that if two instructions conflict and the one given for appellant is right under the law, the giving of the one for plaintiff is error, for which a judgment for him must be reversed. *Ib.*
7. ———: **Damages: Aggravation.** An instruction telling the jury that, if they find for plaintiff in the action for the negligent killing of her husband, they will allow her a sum not to exceed \$10,000, in their discretion, etc., and "you may also take into consideration the facts constituting negligence on the part of the defendant causing the death," was erroneous, first, because there were no aggravating circumstances shown and the instruction was therefore broader than the evidence; and, second, the petition did not plead such a case, and the instruction therefore broadened the issues. *Ib.*

MISTAKE.

Money Had And Received: By Public Officers: Mistake of Law. Where all the participants were officers each acting solely in his official capacity, the rule that money paid under a mistaken view of the law, with full knowledge of the facts, cannot be recovered, has no application. In such case the officer receiving the money must find his right thereto in the law; and no subsequent approval, acquiescence or settlement, non-judicial in character, can operate to justify an unlawful act. *State ex rel. v. Scott*, 146.

MONEY HAD AND RECEIVED.

1. **Payment: Judgment on Pleadings.** In a suit by the State against a county clerk to recover back money paid, an allegation charging that he had wrongfully and falsely certified to the State Auditor that he had extended the taxes upon the assessor's book, and by said false certificate had received a definite sum of money from the State for work he had not at the time performed, is covered by a general denial, and a judgment on the pleadings cannot stand, unless the other plea in the answer that the money was voluntarily paid, with full knowledge of the facts, before any of the work had been done, and that the work was afterwards done by him during his same term of office, constitutes no defense. *State ex rel. v. Scott*, 146.
2. ———: **By Public Officers: Mistake of Law.** Where all the participants were officers each acting solely in his official capacity, the rule that money paid under a mistaken view of the law, with full knowledge of the facts cannot be recovered, has no application. In such case the officer receiving the money must find his right thereto in the law; and no subsequent approval, acquiescence or settlement, non-judicial in character, can operate to justify an unlawful act. *Ib.*
3. ———: **Before Work is Done: Work Done Before Suit: Purpose of Extension on Assessment Book.** The statute (Sec. 11549, R. S. 1909) which allows compensation to the county clerk for "services rendered" in "extending the taxes on the assessment book" does not designate the time within which the work is to be done, nor fix a penalty for failure to do it before making out and delivering the tax book to the collector, and the act is such that the time of its performance has no effect upon the validity of the tax, and is important only (1) as an aid to the clerk in correctly extending the taxes upon the tax book and (2) as a permanent public record of the amount of the tax in accordance with the final orders of the county and state boards; and in an action by the State to recover back money from the county clerk, paid by the State Auditor before the work of extending the taxes on the assessment book was done, but which was done before the action was instituted, there can be no recovery on the theory either (1) of enforcing a penalty for not doing the work sooner or (2) that the payment having been made the duty to do it ceased and its performance thereafter was a work of supererogation. *Ib.*

MORTGAGES AND DEEDS OF TRUST.

1. **Outstanding Equities: Notice: Payment of Existing Mortgages.** The payment in full by the subsequent grantee of existing mortgages held by his grantor is convincing proof that the grantee did not have actual notice of a prior outstanding claim in favor of plaintiff brought about by said grantor. *Marston v. Catterlin*, 5.
2. **After Condition Broken: Ejectment.** The mortgagee, after condition broken, may recover possession of the mortgaged premises

MORTGAGES AND DEEDS OF TRUST.—Continued.

by an action in ejectment, and retain such possession for the purpose of applying the rents and profits upon the principal and interest of the debt; and this applies to a trustee in a deed of trust, in whom, upon condition broken, the legal title is vested. *Wilson v. Reed*, 400.

3. ———: **Interest Alone Due: Foreclosure.** Where a note stipulates that it is to bear interest from date and if the interest be not paid annually to become as principal and bear the same rate of interest, the interest cannot be collected by suit until the maturity of the note; nor can a deed of trust securing such a note be foreclosed for condition broken where it is conditioned only upon the payment of the note according to its tenor. But a deed of trust conditioned for the payment of interest annually may be foreclosed for a breach of that condition, although the note itself has not matured. *Ib.*
4. ———: ———: ———: **One Contract: Independent Conditions.** A note and deed of trust given to secure its payment, both executed at the same time, are one contract and must be construed together, so that effect may be given to all the terms of both instruments where possible to do so; and so a deed of trust may be foreclosed before the maturity of the note which it secures if it has provisions or conditions upon which a forfeiture will take place independently of the terms of the note. *Ib.*

MOTION FOR NEW TRIAL.

Change in Judge. If after a motion for a new trial, charging that the verdict is against the weight of the evidence, is filed, the judge who tried the case is succeeded by another, his successor has power to overrule the motion. *Thompson v. Railroad*, 87.

MOTION TO STRIKE OUT ANSWER.

No Exception. An assignment that the trial court erred in overruling contestants' motion to strike out proponents' amended answer on the ground that it contradicted the original answer, cannot be reviewed on appeal unless an exception was saved to the ruling and the exception and the motion itself were preserved in a bill of exceptions. *Bingaman v. Hannah*, 611.

MUNICIPAL CORPORATIONS. See *Corporations*, 1 to 3.

NAVIGABLE STREAMS.

Current River: Judicial Notice. The court takes judicial notice of what streams are navigable and what are not navigable. Current River is not a navigable water of this State, and will not be conceded to be such although appellant admits it to be in his brief. *Lumber Co. v. Ripley County*, 121.

NEGLIGENCE.

1. **Vigilant Watch Ordinance: Not in Abstract.** Whether or not an instruction permits a recovery against a street railway company if the conductor of the car failed to keep a vigilant watch for vehicles on the track, in violation of a city ordinance, and is for that reason erroneous, or whether or not the ordinance applies only to motormen, will not be decided, if the ordinance is not preserved in the printed abstract. Courts cannot take judicial notice of municipal ordinances however great the municipality. *Peterson v. United Railways*, 67.

NEGLIGENCE—Continued.

2. **Ringling Bell or Sounding Gong: Proximate Cause.** Where both plaintiff and his driver saw and knew of the approaching street car when it was six hundred feet from the place where their automobile was stalled on the track, the failure to give notice of the approach of the car by sounding the gong or otherwise was not the proximate cause of plaintiff's injury caused by the street car striking the automobile, and an instruction basing his right to recover upon such failure is error. The purpose of sounding the gong is to give notice of the car's approach, and if the injured party on the track has actual timely knowledge of its approach, without such sounding, failure to sound the gong cannot be the proximate cause of his injury. *Peterson v. United Railways*, 67.
3. **Methods of Locking Switches: Conflicting Evidence.** Where the evidence as to the custom of railroads in locking switches is conflicting, there being no express rule on the subject, it will not be held as a matter of law that the method employed by defendant was that adopted and practiced by railroads generally, but the question is one of fact for the jury to determine. *Thompson v. Railroad*, 87.
4. **Looking for Lever in Proper Notch: Contributory Negligence.** The switchman's testimony that as the car on which he was riding passed he looked at the switch points and they were in such position against the rails as to show the switch was set for the side track, and that they could not have been in the position in which they were unless the lever was down in the notch in the switch-stand, is evidence that the switch was set for the side track and that the lever was in the proper notch as the car on which he was riding approached the switch; and it was for the jury to determine whether, in failing to see and know that the lever was set in the proper notch, he was guilty of negligence contributing to the derailment caused by the car entering upon the wrong track at the switch. *Ib.*
5. **Riding on Main Line Side of Train.** Under the circumstances of this case, whether it was contributory negligence for the switchman, riding on a car about to pick up another on a side track, to place himself upon the side of the car next to the main line, on which the train was standing, with which his car collided when the switch broke and it entered upon the main line, was a question for the jury. *Ib.*
6. **No Switch Lock.** Likewise, under the circumstances, whether the railroad company, in view of the evidence tending to prove the likelihood of the lever jolting out of the notch at the switch-stand, was negligent in maintaining the switch without a lock, and in running its cars over it at a rate of ten or twelve miles per hour, was a question for the jury. *Ib.*
7. **Instruction: Absolute Safety.** An instruction which required the jury to find that the switch stand where the car left the track was negligently maintained without a lock and that such switch-stand without a lock was not a reasonably safe place—if another instruction defined negligence as "a want of ordinary care" and then properly defined those words—did not require a verdict for the injured switchman unless the switch was absolutely safe. *Ib.*
8. ———: **No Requirement of Conformity to Custom: Non-Direction.** Sufficient proof of usage in the matter of locking a switch and of conformity to custom, may be said to rebut the idea of negligence

NEGLIGENCE—Continued.

in a proper case; and an instruction which excludes the idea that the jury should consider the evidence tending to show the railroad company's practice in leaving the switch unlocked conformed to the usage of well managed lines, would be erroneous; but an instruction which contains no particular direction, but does require a finding of negligence, does not exclude the consideration of such evidence, but amounts only to non-direction, which may be supplied or covered by instructions for defendant. *Ib.*

9. ———: **Assumption of Risks.** If the rules of the railroad company pertain solely to main-line switches and do not require the switch of a cross-over track to be locked, the switchman does not assume the risk of injury resulting from a failure to lock the cross-over switch. *Ib.*
10. **Notice of Dangerous Situation: Crossing Tracks Necessary.** Having constructed its yard office a few feet south of the main track and necessarily making up its freight trains north of the main track, and it being necessary for conductors to obtain their orders and waybills from the yard office, the railway company was bound to know these employees must cross the main line in order to reach their trains about to be taken out. This was notice that such employees were likely to be upon or near the track next to the office. *Kippenbrock v. Railroad*, 479.
11. ———: ———: **Running Train Without Warning or Headlight in Night Time.** And in these circumstances, and there being no particular point used or recognized as a crossing, it was negligence to run an overdue passenger train past the yard office, on the main line, on a dark night, through an unlighted yard, at a speed of thirty or thirty-five miles an hour, without sounding the bell or whistle, and without a headlight burning, particularly when the register in the office indicated the train had already passed, as was observed by the plaintiff freight conductor, who, having received his orders and waybills, had left the office and was proceeding to his freight train along the main line, when suddenly apprehending his danger he leaped back, struck the office building and "rebounded" against the train. *Ib.*
12. **Headlight.** A headlight is a common and necessary means adopted by all railroads for the protection alike of those rightfully on the train, or on the track, or approaching it, in the night time, and to rapidly run a train through railroad yards in the night time without such headlight is negligence. *Ib.*
13. **Lookout for Employees.** The rule that a railroad company is under no obligation to keep a lookout for employees who are aware of what is going on and are required to guard themselves from injuries naturally to be expected, has no application to an act or movement which is of unusual character and the unusualness of which reasonably may deprive the employee of an opportunity to protect himself. *Ib.*
14. **Contributory: Crossing Track by Shortest Course.** The fact that the freight conductor on his way from the yard office across the main line to take his train, did not cross it directly, was at most evidence of contributory negligence, which is not a bar to an action for damages under the Federal Employers' Liability Act. *Ib.*
15. **Instruction: Should.** The use of the word should, used in an instruction in which the jury are told that, if they find certain facts, they "should" return a verdict for plaintiff, is not objectionable.

NEGLIGENCE—Continued.

It imports duty or obligation; and is therefore appropriate to advise the jury of their duty. *Klippenbrock v. Railroad*, 479.

16. ———: **Contributory Negligence as Diminution of Damages: In Language of Statute.** In an action brought under the Federal Employers' Liability Act, an instruction telling the jury, if they find certain facts, to return a verdict for plaintiff, "even if you should find him guilty of negligence contributing to the injury, but in that event the damages should be diminished by you in proportion to the amount of negligence attributable to plaintiff," using the language of the statute, uses a formula that is exempt from criticism. But whether an instruction explaining the statutory language should have been given, is not decided, because none such was asked, and the question is not in the record. *Ib.*
17. **Boarding Moving Car: Contributory Negligence Per Se.** There is no cause of action against the carrier in favor of one who is injured as a result of his attempt to board a moving car if the carrier is guilty of no act of negligence beyond the mere fact that the car is moving at the time. In such case the person who attempts to board a car while it is in motion assumes the risk of injury from the ordinary movements of the car, but is not chargeable with negligence *per se*. *Gunn v. United Railways*, 517.
18. ———: **After Slowing Down: Premature Start: Mental Excitement.** If a person, desiring to board a street car which merely slows down without stopping at the proper place or starts prematurely after having stopped, is laboring under great mental excitement, caused by facts which make it especially desirable and necessary to board the car at that place and such excitement is great enough to deprive him of the power to safely judge the dangers of the situation, and if the agents of the carrier know or under the circumstances are bound to be aware of such conditions of excitement, the carrier's failure to stop the car or to hold it a reasonable length of time is negligence, and the risk of injury from boarding the moving car is not assumed by such person; but if he is not laboring under such excitement, and is not directed by the carrier's agent to enter, he cannot recover for injuries caused by ordinary movements of the car. *Ib.*
19. ———: **When Plaintiff May Recover.** A person seeking to recover damages for injuries received while boarding or leaving a moving street car, must show that the carrier caused him to be put in a dilemma, such as to cause excitement of mind rendering him for the moment unable to properly choose between two courses of action, or that the carrier's agents made some order, request or direction that he board or leave the car, or that there was some sudden shock or acceleration of speed of the car while he was getting on or off; or some defect in the car which increased the danger, or some other facts showing negligence of the carrier other than the mere fact that the car was in motion when he made the attempt to board or leave it. *Ib.*
20. ———: ———: **No Contributory Negligence.** A person not under unusual excitement who attempts without invitation to board a moving street car after it has started in ordinary movement, cannot recover for injuries so received, regardless of the question of whether he was himself guilty of negligence, even though the car after having been stopped was started without giving him reasonable time to board it. *Ib.*

NEGLIGENCE—Continued.

21. ———: **Act of Entering: When a Passenger: Instruction.** One who has hold of the rail or has a foot on the step for the purpose of entering is in the act of entering the car. Nor is it the law that in all cases a person must have hold of the rail or have a foot on the step in order to be in the act of entering. If he intends to take passage on a street car and has hailed it for that purpose, and it has been stopped to enable him to enter, he is to be regarded as a passenger while he is in the act of carefully and prudently attempting to step upon the platform. So the carrier is not entitled to an instruction telling the jury that if when plaintiff took hold of the hand rail the car was moving, he cannot recover. *Ib.*
22. **Circuit Court: Power to Order Examination of Premises for Evidence.** The circuit courts of Missouri are courts of original and general jurisdiction, possessing practically the same powers as *nisi prius* courts in England, among which was the power to permit plaintiff and his counsel, in a civil suit against a corporation, to visit defendant's manufacturing plant, and enter upon its premises, with experts and photographers, for the purpose of inspecting and measuring the same, and making drawings and taking photographs to be used as evidence in the trial of said action; and such power was not taken away by the constitutional provisions against unreasonable search and seizure, nor is a legislative statute necessary to the exercise of such power by the court. *State ex rel. v. Anderson*, 533.
23. ———: ———: **Invasion of Property Rights: Similar to Examination by Physicians.** The power of the court to permit plaintiff, in a personal injury action based on a charge of an unsafe place in which to work or unsafe tools, to visit the factory of the company causing the injury, with proper persons and on a proper occasion, for the purpose of obtaining photographs or drawings to be used in the trial of the case, is based on the power of the court to know the facts which determine the plaintiff's right to recover and defendant's liability, and if reasonably exercised is not an invasion of property rights, but is similar to the power of the court to compel the plaintiff suing for personal injuries to submit to an examination by physicians appointed by the court, and for a stronger reason should be upheld. since personal rights are superior to property rights, and their violation a more serious matter. *Ib.*
24. ———: ———: **Based Upon Inherent Relationship of Employment.** Since the law requires the employer to furnish his employees a reasonably safe place in which and reasonably safe appliances with which to work, and a violation of either duty is a basis for a legal action for damages for personal injury to the employee, the law must either impose an implied agreement upon the employer, arising out of the contractual relation, that the employee, in case of injuries due to failure to provide such safety, shall have the right, at a proper time, in a reasonable manner and in company with proper persons, to visit and inspect such place and appliances, in order that they may testify as to their condition, or the law should expressly impose upon the employer the duty to expose to the injured employee and his experts, at a proper time and in a reasonable manner, the place where and the tools by which he was injured. *Ib.*
25. **Mining: Duty as to Safety.** It is the duty of the miner to keep his working place safe; it is the duty of the master to keep the entries (the places generally used by numerous miners) in a condition of reasonable safety. *State ex rel. v. Ellison*, 645.

NEGLIGENCE—Continued.

26. **Instructions: Broader Than Pleading or Evidence.** An instruction cannot be broader than the pleadings, nor broader than the facts proven; it must be within the purview both of the pleadings and the evidence. *State ex rel. v. Ellison*, 645.
27. ———: ———: **Mining: Place of Danger.** Where the miner was working at removing roof supports that had been left when the rooms of the mine were "turned," and his petition is drawn on the theory that at a point in the mile-long entry fifty to twenty five feet from his working place his master had permitted a bad roof to remain, and he had gone to that point to eat his dinner, not knowing it was unsafe, and was killed by the falling of the fragile roof, an instruction which permits a recovery if a large slab of rock fell from the roof of "one of the main entries," without limiting the point of injury to the place in the entry at which the petition charges the negligence was, is broader than the pleadings, and a verdict cannot be upheld on the theory that the error was harmless. *Ib.*
28. ———: ———: **Harmless Error.** If evidence assuming a broader field than the pleadings is erroneously admitted, instructions based upon such evidence which are broader than the pleadings cannot be held to be harmless. That course would require defendant to meet an issue of which the petition did not give him notice. *Ib.*
29. ———: ———: ———: **Certiorari: Quashing Opinion of Court of Appeals.** The Court of Appeals cannot preclude a review by the Supreme Court of an instruction that is broader than the pleadings by merely saying it is harmless. *Ib.*
30. ———: **Conflicting.** An instruction for plaintiff authorizing a recovery if a loose slab of rock fell from the roof of "one of the main entries of defendant's mine" and crushed the miner, is in direct conflict with a correct instruction given for defendant telling the jury, in the language of the petition, that they must find the roof fell at a point fifteen to twenty feet from his working place; and by repeated decisions it has become the established rule of law in this State that if two instructions conflict and the one given for appellant is right under the law, the giving of the one for plaintiff is error, for which a judgment for him must be reversed. *Ib.*
31. ———: **Damages: Aggravation.** An instruction telling the jury that, if they find for plaintiff in the action for the negligent killing of her husband, they will allow her a sum not to exceed \$10,000, in their discretion, etc., and "you may also take into consideration the facts constituting negligence on the part of the defendant causing the death," was erroneous, first, because there were no aggravating circumstances shown and the instruction was therefore broader than the evidence; and, second, the petition did not plead such a case, and the instruction therefore broadened the issues. *Ib.*
32. **Tort: Messenger Boy: Right to Street.** A messenger boy sent out by a telegraph company to deliver a telegram does not travel on the street by permission of the company, but in the exercise of a valuable public right; that right is a part of his own equipment for the service in which he engaged; and for his torts, committed in playfulness in no wise connected with the performance of his work or inconsistent with the terms of his employment, the company is not liable. *Phillips v. W. U. Tel. Co.*, 676.
33. ———: ———: **Running Into Pedestrian.** A messenger boy with a telegram in his hand ran along the sidewalk on which plaintiff was standing, and coming up to a newsboy with a bundle of papers

NEGLIGENCE—Continued.

under his arm asked him for a paper, and being refused snatched one from the bundle and ran, and looking over his shoulder as he ran collided with plaintiff with such force as to knock her ten feet into the street and seriously injure her. *Held*, that the telegraph company was not liable in damages for the tort.

Held, by WOODSON, J., dissenting, that the same rule of law applies as would apply if the injury had been inflicted by the telegraph company's automobile instead of the messenger boy's body coming into negligent collision with plaintiff; that he was performing the master's business at the time the injury was inflicted, and had he not been so engaged he would not have committed the tort, and the mere fact that he side-stepped a few feet from his journey to gratify some personal desire does not change the rule. *Ib*.

NOTICE.

1. **Outstanding Equities: Payment of Existing Mortgages.** The payment in full by the subsequent grantee of existing mortgages held by his grantor is convincing proof that the grantee did not have actual notice of a prior outstanding claim in favor of plaintiff brought about by said grantor. *Marston v. Catterlin*, 5.
2. ———: **Constructive Notice: Special Warranty Deed.** A purchaser by general warranty, in whose chain of title is a remote recorded deed which in effect is nothing more than a quit-claim with a special warranty covenanting against any one who might claim under the grantor therein, is not thereby, being without actual notice, chargeable with constructive knowledge of outstanding equities existing at the time the special warranty was made. *Ib*.
3. ———: ———: ———: **Grantee Under Quit-Claim.** A subsequent grantee in a general warranty deed is not prevented from occupying the position of a bona-fide purchaser, without notice, merely because some prior conveyance in his chain of title is a quit-claim or special warranty deed. In such case the general rule applicable to the grantee in a quit-claim deed, should not be applied to a grantee in a subsequent warranty deed. [*Distinguishing Mason v. Black*, 87 Mo. 329, and *Freeman v. Moffitt*, 119 Mo. 280.] *Ib*.
4. **Negligence: Ringing Bell or Sounding Gong: Proximate Cause.** Where both plaintiff and his driver saw and knew of the approaching street car when it was six hundred feet from the place where their automobile was stalled on the track, the failure to give notice of the approach of the car by sounding the gong or otherwise was not the proximate cause of plaintiff's injury caused by the street car striking the automobile, and an instruction basing his right to recover upon such failure is error. The purpose of sounding the gong is to give notice of the car's approach, and if the injured party on the track has actual timely knowledge of its approach, without such sounding, failure to sound the gong cannot be the proximate cause of his injury. *Peterson v. United Rys.*, 67.
5. **Election Contest: Jurisdiction: Waiver.** Jurisdiction of the subject-matter cannot be waived; and the circuit court does not obtain jurisdiction of an election contest unless notice is served upon contestee within the time prescribed by the statute. The contestee does not waive notice or confer jurisdiction on the court to try the contest, by duly and specifically challenging the jurisdiction and power of the court to proceed with the contest under an alleged notice, or by thereafter filing a counter notice of a contest

NOTICE—Continued.

of his own after the time for serving notice on him has expired. State ex rel. v. Robinson, 212.

6. ———: ———: **Service of Notice: Must be by Officer.** Notice in an election contest operates in the nature of a petition and writ in an ordinary civil action, and can be served only by the officer of the court wherein the contest is instituted. It cannot be served, any more than can a summons in an ordinary civil action, by some private person or by contestant himself. The circuit court does not obtain jurisdiction to try an election contest upon a notice served by a private person. *Ib.*
7. ———: ———: **Interlocutory Notices: Service by Private Person.** Section 1791, Revised Statutes 1909, declaring that "service of any notice required by this chapter may be made by any sheriff, marshal or constable, or by any person who would be a competent witness," does not refer to the notice or summons which brings a party into court for the purpose of forcing him to submit to a trial, such as a defendant in an ordinary civil action or a contestee in an election contest, but refers only to interlocutory notices, that is, notices required to be given in the progress of a cause. *Ib.*
8. ———: ———: **Posting Notice in Clerk's Office.** The failure of a private person to find contestee in an election contest will not suffice as a basis for a substituted service until the effort to get personal service has failed, and that effort must be made by an officer of the court, and cannot be made by a private person; and a posting of the notice in the office of the circuit clerk, after unavailing efforts by a private person to obtain personal service, does not bring contestee into court, and gives the court no jurisdiction to try the case. *Ib.*
9. **City Extension: Validity.** A contention that the city limits were not legally extended to embrace the lands to be taxed with the costs of constructing a main sewer because no notice of the election was given, will not be considered, if fifteen years have elapsed since the extension was made. *Whitsett v. Carthage*, 269.
10. **Suit on Special Tax Bill: Filing With Comptroller.** Sections 9848 and 9849, Revised Statutes 1909, requiring notice of suit brought on a special tax bill to be filed within ten days with the city comptroller, and declaring that unless such notice is filed and suit is brought within two years the lien shall cease, do not condition the right to sue, or to maintain the suit after its institution, upon the filing of said notice. All legitimate objects of the notice are subserved if it is filed before the trial and the expiration of the lien. *Construction Co. v. Realty Co.*, 450.
11. **Negligence: Notice of Dangerous Situation: Crossing Tracks Necessary.** Having constructed its yard office a few feet south of the main track and necessarily making up its freight trains north of the main track, and it being necessary for conductors to obtain their orders and waybills from the yard office, the railway company was bound to know these employees must cross the main line in order to reach their trains about to be taken out. This was notice that such employees were likely to be upon or near the track next to the office. *Klippenbrock v. Railroad*, 479.
12. ———: ———: **Running Train Without Warning or Head-light in Night Time.** And in these circumstances, and there being no particular point used or recognized as a crossing, it was negligence to run an overdue passenger train past the yard office, on the

NOTICE—Continued.

main line, on a dark night, through an unlighted yard, at a speed of thirty or thirty-five miles an hour, without sounding the bell or whistle, and without a headlight burning, particularly when the register in the office indicated the train had already passed, as was observed by the plaintiff freight conductor, who, having received his orders and waybills, had left the office and was proceeding to his freight train along the main line, when suddenly apprehending his danger he leaped back, struck the office building and "rebounded" against the train. Ib.

13. ———: **Headlight.** A headlight is a common and necessary means adopted by all railroads for the protection alike of those rightfully on the train, or on the track, or approaching it, in the night time, and to rapidly run a train through railroad yards in the night time without such headlight is negligence. Ib.

NUISANCE. See **Injunction**, 6 to 11.

OFFICERS.

1. **Collector of St. Louis: Elected in April, 1913.** No one could be or was legally elected to the office of Collector of the Revenue for the city of St. Louis at the April election held in 1913. Said office is a county office, and the statute (Sec. 11432, R. S. 1909; Laws 1905, p. 272) requires the Collector to be elected at the general election held in November, 1906, and every four years thereafter. *State ex inf. v. Koeln*, 174.
2. ———: **Charter Provisions: Special Laws.** It was not intended that the provision of the Constitution of 1875, which provided that the charter to be framed for the city of St. Louis "shall supersede all special laws relating to St. Louis County," should for all future time be the controlling law upon the subject-matter covered by said existing special laws; for the Constitution also says that such charter "shall always be in harmony with and subject to the Constitution and laws of this State," that the city shall "collect the State revenue and perform all other functions in relation to the State in the same manner as if it were a county," and that "the General Assembly shall have the same power over the city and county of St. Louis that it has over other cities and counties;" and although there was a "special law" applicable to the county of St. Louis providing for the election of a collector for said county when the Constitution of 1875 was adopted, and the charter as framed named the collector as a city officer and provided for his election, the General Assembly, under these constitutional provisions, had authority to enact a statute applicable to all counties, including the city of St. Louis, and to require the election of a collector of the revenue in each at the general election held in November, 1906, and every four years thereafter, as it did in 1905, Laws 1905, p. 272. Ib.
3. ———: **Elected for Unexpired Term: Entrance into Office.** The office of Collector of the Revenue begins in March, and the general statute provides that in case of a vacancy occurring in said office it shall be filled by appointment by the Governor and that such appointee shall hold office until March. The person elected at the preceding November election to fill an unexpired term does not take possession of the office immediately upon his election, nor until the next March, whether the Governor filled the vacancy by appointment prior or subsequent to such election. Ib.

OFFICERS—Continued.

4. ———: ———: ———: **Appointment After Election.** The fact that the Governor failed to appoint some one to fill the vacancy in the office of Collector of Revenue, which had existed for sometime, until after the election of respondent to fill the unexpired term, did not authorize respondent to assume the duties of the office. The statute does not declare when the appointive power shall be exercised, and he may therefore exercise it at any time before the expiration of the time the statute says his appointee shall occupy the office. Besides, respondent's title to the office comes through and by virtue of the rights incident to his election, and not through any default or delayed action of the Governor. *State ex inf. v. Koeln*, 174.

OVERCHARGES OF FREIGHT RATES. See *Railroads*.

PARTITION.

1. **Subject to Life Estate: Agreement Not to Divide.** Where three daughters to whom a mother conveyed land subject to a life estate reserved for herself, at her request, entered into a written agreement not to "ask for a division or partition," the agreement "to continue in force and be binding on each party hereto while they live," the heirs of one of the daughters who has died are entitled to have partition, subject to the life estate of the mother. The agreement should not, without good reason, be construed to bind the survivors to continue the cotenancy with the heirs of the deceased. *Flournoy v. Kirkman*, 1.
2. **Homestead: Money in Lieu of Dwelling.** The existence of the home, and not the money which represents its value, is the foundation of the homestead statutes. They refer only to the dwelling house for the family and the surrounding soil from which the sustenance of the home is to spring. *Dalton v. Simpson*, 287.
3. ———: **In Partition: Governed by Section 6713: Power of Court.** Since the Partition Act is silent as to homesteads, resort must be made to section 6713, Revised Statutes 1909, which is a part of the Homestead Statute, whenever lands in which a homestead exists are brought into partition. Under that statute the only power the court has is to sever it from the balance of the real estate sought to be partitioned. *Ib.*
4. ———: ———: **Section 6714.** The Legislature meant, by Sec. 6714, R. S. 1909, which authorizes the sale of the homestead in certain contingencies and which is the only provision of law by which it is possible for the courts to deprive the widow and minors of their homestead, to guard their rights with care. It cannot be used as a device by which adult heirs and other plaintiffs in partition may swallow the homestead or extinguish it by relegating the widow and minors to the value of the homestead or to the net income arising from such value. *Ib.*
5. ———: **Not Subject to Partition.** A homestead as such is not subject to partition. If it can be severed and set apart from the rest of the real estate, it cannot be sold at the partition sale. *Ib.*
6. **Severance and Subsequent Sale of Homestead: Bill of Exceptions.** Where the proceedings in a partition suit have been regular up to the time the report of the commissioners appointed to admeasure and set off the homestead has been filed, the court cannot thereafter order the homestead sold and the value thereof placed in the hands of a trustee for the use of the widow and minors; and if such an order is embodied in a judgment subsequently rendered

PARTITION—Continued.

ordering distribution, it as well as the judgment are for review on appeal, as matters of record proper, and a bill of exceptions is not necessary. *Ib.*

PEDESTRIAN. See *Negligence*, 32 and 33.

PENALTY PENDENTE LITE. See *Injunctions*.

PLEADING.

1. **Prayer and Relief: Land on an Accounting.** A supplemental bill whereby plaintiff seeks to have vested in him the title of certain land, which has been conveyed since suit was begun, and in which he prays that, if the court should find that the present record owner is a purchaser in good faith and for value, so that the plaintiff shall have no right of redemption against him, the original defendant shall be decreed to account for and pay over to plaintiff the proceeds of the property so conveyed by him since the filing of the original petition, is sufficient to entitle plaintiff to an accounting for the proceeds in the event the court could not give him the land. *Marston v. Catterlin*, 5.
2. **Injunction: Public Nuisance: Selling Liquors.** Injunction cannot be used to restrain the sale of beer in a county which has adopted the Local Option Law unless the seller has been guilty of aiding and abetting the commission of a public nuisance. *State ex rel. v. Brewing Co.*, 100.
3. ———: ———: ———. The petition for an injunction to restrain the selling of intoxicating liquors must specifically set out the facts constituting the public nuisance. The mere statement of legal conclusions is not sufficient. *Ib.*
4. ———: ———: ———: **Statement of Cause of Action.** A petition for an injunction charging that defendant from its brewery in Illinois daily sells and ships into a Missouri county in which the Local Option Law is in force, to divers persons, large quantities of beer; that it has been so selling and shipping for a long time, and will continue to do so unless restrained therefrom, does not state the semblance of a cause of action, because (1) the statute (Sec. 7228, R. S. 1909) authorizes any person in such county to order liquor for his own and his family's use where it is sent directly to him, (2) the brewer is authorized to sell beer in Illinois to such a person, and (3) in the absence of any charge to the contrary it cannot be presumed that the brewer was violating any law in shipping beer to persons in said county. *Ib.*
5. ———: ———: ———: **Public Nuisance: Aiding Sales.** And a petition which further charges that by reason of such shipments divers persons are enabled to sell, barter and give away said beer in said county, contrary to the Local Option Law; that by reason thereof said Illinois brewer is assisting and enabling such persons to sell beer in said county by retail and thereby maintaining a public nuisance, fails to state any facts which even remotely tend to show that the defendant brewer violated any law in selling said beer in Illinois, or assisted by such sale in establishing a nuisance in said county. *Ib.*
6. ———: ———: ———: **Turbulent Crowds; Sciencer.** And averments in said petition that by reason of the sale of beer in said local-option county large crowds of idle and turbulent people assemble at the places where such beers are kept and sold, to the great injury of society and the general welfare of the people of the

PLEADING—Continued.

county, without naming the vendors or the places where the beers are sold, and without charging that the defendant or any of his agents knew or knows of the congregation of said idle and turbulent persons, does not charge facts sufficient to show that the defendant brewer in Illinois is maintaining a public nuisance in said county. *State ex rel. v. Brewing Co.*, 100.

7. ———: ———: **Crime.** The congregation of divers idle and turbulent persons in secret places where intoxicating liquors are sold and drunk may constitute a crime; but a brewer, who is not charged with knowledge of their turbulent character or of their assembling and drinking in such secret places, is not maintaining a public nuisance by the mere fact that the beer sold at his Illinois brewery enables divers persons to sell it in such Missouri town. *Ib.*
8. **Money Had And Received: Payment: Judgment on Pleadings.** In a suit by the State against a county clerk to recover back money paid, an allegation charging that he had wrongfully and falsely certified to the State Auditor that he had extended the taxes upon the assessor's book, and by said false certificate had received a definite sum of money from the State for work he had not at the time performed, is covered by a general denial, and a judgment on the pleadings cannot stand, unless the other plea in the answer that the money was voluntarily paid, with full knowledge of the facts, before any of the work had been done, and that the work was afterwards done by him during his same term of office, constitutes no defense. *State ex rel. v. Scott*, 146.
9. **Libel: Cause of Action.** An article published in a medical journal charging that the virtue of a medical college "was sullied when an Allopath was placed on the faculty and permitted to purchase a block of its stock, and its final prostitution completed when that same Allopath secured by purchase a controlling interest;" that "this individual professed great love for Eclectic principles, was accepted into our Eclectic societies, and in every way inveigled himself into the good graces of Eclectics, with, we believe, the direct aim of destroying" the college "as an Eclectic institution;" that "this simply goes to show that you cannot change a wolf into a sheep, even if you do clothe him in a coat of wool;" and that "hence the inevitable has happened; that flock of sheep feels the fangs of the animal which could not be hidden for long," charged and was intended to charge that said "Allopath," by fraud, deceit and trickery, got possession of the college and by false representations and actions won the confidence of Eclectics, for the purpose of destroying said college as an Eclectic school; and a petition which sets forth such article, and then by apt allegations avers that it was written and published by defendant and that the charges were intended to charge plaintiff with those things and were false and maliciously made, states a cause of action. *Link v. Hamlin*, 319.

PRACTICE.

1. **New Trial: Change in Judge.** If after a motion for a new trial, charging that the verdict is against the weight of the evidence, is filed, the judge who tried the case is succeeded by another, his successor has power to overrule the motion. *Thompson v. Railroad*, 87.
2. **Law of Case: Different Suit.** Whether or not it be true that the law as declared by the court on one appeal continues to be law of that case upon a subsequent appeal, the rule has no application to a new and separate action. *State ex rel. v. Eastin*, 193.

PRACTICE—Continued.

3. ———: ———: **Mandamus: Demurrer Sustained.** If it no where appears in the alternative writ that a suit by mandamus has previously been brought, and the facts of a former suit are not set forth therein, an appeal from the ruling of the trial court sustaining a demurrer to the alternative writ is not a second appeal, and hence it cannot be held that the rulings on appeal in a former mandamus case have become the law of this second suit. *Ib.*
4. **Appeal: Facts of Former Suit: Judicial Notice.** The Supreme Court takes notice of a former appeal and the record thereof, but does not notice the facts and records in one action when called upon to rule another and separate action. *Ib.*
5. **Libel: Demurrer to Evidence.** In passing upon a demurrer to the evidence it is the duty of the court to draw every reasonable inference from the facts proven that a jury might draw, were the case submitted to them. And where the petition states a cause of action for libel, the publication contains libelous charges and is shown to have been made by defendant, and its charges shown to be false, no demurrer to the evidence should be sustained. *Link v. Hamlin, 319.*
6. **Motion to Strike Out Answer: No Exception.** An assignment that the trial court erred in overruling contestants' motion to strike out proponents' amended answer on the ground that it contradicted the original answer, cannot be reviewed on appeal unless an exception was saved to the ruling and the exception and the motion itself were preserved in a bill of exceptions. *Bingaman v. Hannah, 611.*
7. **Witness: Ruling of Incompetency: No Offer of Testimony.** The ruling of the trial court that a certain witness offered by appellants was incompetent to testify will not be reviewed on appeal unless the ruling was followed by an offer to prove what the witness's testimony would be if he were permitted to testify. *Ib.*
8. **Constitutional Question: Untimely Raised.** A constitutional question is neither timely nor otherwise sufficiently raised by an assignment in the motion in arrest that "the facts stated in said information do not constitute a charge or offense under the Constitution and laws of this State" and by an allegation in the assignment of errors that the statute in question is in violation of section 8 of article 1 of the Constitution of the United States. *State v. Swift & Co., 694.*
9. ———: **Assignment Must Be Specific.** To raise a constitutional question the particular provision of the Constitution alleged to be violated must be pointed out. *Ib.*
10. ———: **Previously Decided.** A plea of unconstitutionality will not confer jurisdiction where the Supreme Court has theretofore held the statute in question valid. *Ib.*

PROCESS.

1. **Election Contest: Jurisdiction: Waiver.** Jurisdiction of the subject-matter cannot be waived; and the circuit court does not obtain jurisdiction of an election contest unless notice is served upon contestee within the time prescribed by the statute. The contestee does not waive notice or confer jurisdiction on the court to try the contest, by duly and specifically challenging the jurisdiction and power of the court to proceed with the contest under an alleged notice, or by thereafter filing a counter notice of a contest of his

PROCESS—Continued.

own after the time for serving notice on him has expired. *State ex rel. v. Robinson*, 212.

2. ———: ———: **Service of Notice: Must be by Officer.** Notice in an election contest operates in the nature of a petition and writ in an ordinary civil action, and can be served only by the officer of the court wherein the contest is instituted. It cannot be served, any more than can a summons in an ordinary civil action, by some private person or by contestant himself. The circuit court does not obtain jurisdiction to try an election contest upon a notice served by a private person. *Ib.*
3. ———: **Interlocutory Notices: Service by Private Person.** Section 1791, Revised Statutes 1909, declaring that "service of any notice required by this chapter may be made by any sheriff, marshal or constable, or by any person who would be a competent witness," does not refer to the notice or summons which brings a party into court for the purpose of forcing him to submit to a trial, such as a defendant in an ordinary civil action or a contestee in an election contest, but refers only to interlocutory notices, that is, notices required to be given in the progress of a cause. *Ib.*
4. ———: ———: **Posting Notice in Clerk's Office.** The failure of a private person to find contestee in an election contest will not suffice as a basis for a substituted service until the effort to get personal service has failed, and that effort must be made by an officer of the court, and cannot be made by a private person; and a posting of the notice in the office of the circuit clerk, after unavailing efforts by a private person to obtain personal service, does not bring contestee into court, and gives the court no jurisdiction to try the case. *Ib.*

PROMOTION OF PUBLIC IMPROVEMENT. See *Interstate Commerce*.

PUBLIC ROADS. See *Roads and Highways*.

PUBLIC SCHOOL DISTRICT. See *Schools*.

PUBLIC SERVICE COMMISSION.

1. **Powers: Limited by Constitution.** Despite the fact the statutes of other States creating public service commissions and defining their powers may be similar to and are often identical with our own, in construing the Missouri act little aid is afforded by the decisions of such States, since their organic laws are different from ours, and our legislative acts are restricted by plain constitutional provisions. *State ex rel. v. Public Service Comm.*, 429.
2. ———: **To Direct Construction of Street Railway.** The Public Service Commission has no power to order an existing private corporation to apply to a municipal authority for a franchise to construct and operate a street railway in the public streets of a city. *Ib.*
3. ———: ———: **Consent of City.** Since the Constitution (Art. 12, sec. 20) prohibits the General Assembly from enacting a law granting the right to construct and operate a street railroad in any city "without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by said street railroad," the Public Service Commission has no power, although a statute attempts to authorize it to do so, to order a private company, operating a street railway on certain streets of a city, to apply to the municipal authorities for a franchise to construct and operate a street railway on other streets. *Ib.*

PUBLIC SERVICE COMMISSION—Continued.

4. ———: ———: ———: **Source of Power.** The source of the power to consent to the construction of a railway on a public street is the local authorities; the language of the constitutional provision (Art. 12, sec. 20) is not directed solely to corporations seeking the privilege to construct and operate a street railroad; a condition precedent to the validity of a statute authorizing such use of a public street is that the consent of the local authorities be first obtained. *Ib.*
5. ———: ———: **Exceptions to Constitutional Inhibition.** Modifications in the application of a constitutional provision are permissible only in the presence of clearly defined exceptions, and where such are neither expressed nor implied neither courts nor the General Assembly have any authority to make them. *Ib.*
6. ———: ———: ———: **Legislative Modification.** In a conflict between the Constitution and a statute the latter must yield. Subsequent legislation cannot modify the Constitution. *Ib.*
7. ———: **Consent: Compulsion: By Indirection.** Consent such as the law recognizes cannot be the subject of compulsion. Its existence depends on the exercise of the voluntary will of those from whom it is obtained. The Public Service Commission cannot by an order directing a private corporation to extend its railway tracks upon unoccupied public streets and to obtain within thirty days the permission of municipal authorities to do so, compel, in this indirect way, said authorities to consent to such extension. *Ib.*
8. ———: **Statute Restricted to Constitutional Limitations.** It will not be presumed that the Legislature intended to enact an invalid law. The extensive powers given by section 49 of the Public Service Act, Laws 1913, p. 588, to the Commission to order a street railway to construct additional tracks and make such changes, improvements and additions as may promote the security and convenience of the public or secure adequate service or facilities for the transportation of passengers, are to be construed as subservient to and in harmony with the constitutional provision forbidding such extensions until the municipal authorities consent to such construction, and not as authorizing the Commission to order the railway company to take the initiative in procuring the required consent. *Ib.*
9. ———: **Scope of Statute: Incidental Facilities.** The Public Service Commission has power to order the construction of such side-tracks, switches, cross-overs and terminals as are incidental to the operation of the main lines of an existing railway corporation; but the Legislature has no constitutional authority, and hence the Commission is not empowered, to compel such corporation, in the absence of authority in its charter, to enter new territory by the extension of its lines of railway upon other public streets. *Ib.*
10. ———: **St. Louis Charter: Statute Paramount.** Under the provision of the Constitution authorizing the city of St. Louis to frame and adopt a charter for its own government, the city did not acquire the right to assume all powers the State may exercise within the city limits, but only those incident to it as a municipality or which concern matters of purely local government. *Ib.*
11. ———: ———: **Control of Public Utilities.** The provisions of the present St. Louis charter which attempt to vest in the Board of Aldermen full power to regulate the construction, operation, charges and facilities of a public utility, not being a matter of

PUBLIC SERVICE COMMISSION—Continued.

- purely local or municipal concern, must yield to the paramount authority of the statute investing such regulation in the Public Service Commission. *State ex rel. v. Public Service Comm.*, 429.
12. ———: **Abandonment of Franchise by Non-User.** The right or franchise granted to a company to build a railway on a named street, unused for twenty-four years, is to be considered as abandoned by the company; and the Public Service Commission is not authorized by reason of the original grant to direct the company in regard to its exercise. [On Motion to Modify Opinion.] *Ib.*
13. ———: ———: **Judicial Forfeiture.** The consent of the city to the occupancy of its streets by a railway company is not technically a contract, but a privilege or license, and being such and being unused for such a length of time as to constitute an abandonment, a judicial proceeding to effect its forfeiture is not necessary. [On Motion to Modify Opinion.]
14. **Railroad Rates: Power of Public Service Commission.** Section 47 of the Public Service Commission Act, Laws 1913, p. 583, confers upon the Commission authority to raise railroad rates above the maximum theretofore fixed by the Legislature. *State ex rel. v. Public Serv. Comm.*, 547.
15. ———: **General Powers of Legislature.** The General Assembly may pass any law upon any subject not forbidden by the organic law. That power is conferred by section 1 of article 4 of the Constitution, which says that "the legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives to be styled 'the General Assembly of the State of Missouri.'" Pursuant to this general power to enact legislation, the General Assembly had enacted laws fixing maximum passenger and freight charges prior to the incorporation of section 14 of article 12 in the Constitution of 1875 which explicitly conferred the power of "establishing reasonable maximum rates." [Explaining statement in *State v. M. K. & T. Ry. Co.*, 262 Mo. 1. c. 522.] *Ib.*
16. ———: **Power of Legislature.** The General Assembly has power to fix reasonable maximum rates for the carriage of freight and passengers, in the absence of any specific authority such as is contained in section 14 of article 12 of the Constitution explicitly conferring the power. *Ib.*
17. ———: ———: **Delegation of Power.** The power of prescribing maximum rates for common carriers, which the Legislature inherently possesses, may be delegated to a railroad commission or to a public service commission, unless inhibited by express constitutional provision. And if the fixing of rates is to proceed intelligently along lines of fairness to all concerned—to passenger, shipper, carrier, laborer and the public—with due regard to constant mutations in costs of labor and the amount of traffic, the matter should be delegated to a body having time for investigation and aided by expert machinery and having greater flexibility than a short-term Legislature possesses. *Ib.*
18. ———: ———: **Constitutional.** Although by doing so it repealed existing statutes fixing maximum rates, the Legislature was not inhibited by the provision of the Constitution declaring that "the General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in the State, and shall from time to time pass laws establishing reasonable maximum

PUBLIC SERVICE COMMISSION—Continued.

rates of charges for the transportation of passengers and freight on said railroads" from creating the Public Service Commission and directing it, after a hearing and proper expert investigation, to ascertain what maximum rates are reasonable and fix the same by an order, and declaring that said rates so ascertained and fixed should "thereafter be observed" by the railroads. The Legislature did not thereby delegate to the Commission the absolute power of fixing maximum rates, but only the power to ascertain and determine what rates are reasonable, and it is those rates that the General Assembly "established"—subject all the time to review by the courts as to their reasonableness.

Held, by BOND, J., dissenting, that since the General Assembly did exercise its exclusive power to establish and fix maximum rates, it could not thereafter exercise it again except through the medium of its own power as a legislative body; and since the Constitution says that the General Assembly shall establish maximum rates, it was powerless to delegate the power to any commission, and to do so is to contravene this constitutional provision. *Ib.*

PUBLIC UTILITIES.

1. **Contract: Water Supply to Citizens Outside City: Abrogation by Extension of City Limits.** An existing contract fixing a rate for water service and bottomed on a valuable consideration, between a private consumer who lives outside the city limits, and a public utility company operating within the city, is not abrogated and the parties are not bound by the city's water rates *ipso facto* when the consumer is taken into such city by the extension of its limits. [Overruling *State ex rel. Waterworks Co. v. Gelger*, 246 Mo. 74.] *State ex rel. v. Eastin*, 193.

2. ———: **Between City and Water Company: Rates Subject to Alteration by City.** Under the statute declaring that "when water shall be taken by private individuals from any waterworks not owned by the city, the mayor and common council shall have the right, by ordinance, from time to time, to fix the rates to be charged therefor," a public water company is to be held to have contracted with the city with full imputed knowledge of and subject in all ways to all powers and restraints connoted by said statute, and is bound thereby just as fully as if it had been written at large in its franchise contract with the city, and no reduction of rates by ordinance would amount to a violation of the obligation of a special contract between the company and a consumer who stands in exact equality with other consumers. But an independent contract of a water company (which has a franchise contract with the city to furnish water to its inhabitants) to furnish water at higher rates to a consumer outside the city limits, running for a limited and reasonable term, based upon a valuable consideration not paid by city consumers, in which the consumer does not reserve to himself any right of regulation and is not authorized by any statute to regulate rates, is not abrogated or impaired by the extension of the city limits so as to include said consumer, and he does not satisfy the obligation of said independent contract by paying the rates imposed by the franchise contract upon consumers of like amounts of water residing within the city prior to such extension.

Held, by WOODSON, J., dissenting, that the consumer in this case (*State Hospital No. 2*) was not a private citizen, but a public corporation, incorporated for governmental purposes, and both it and the water company contracted with each other knowing the public character of the other and their mutual rights and

PUBLIC UTILITIES—Continued.

obligations, and, independent of the contract, it became the legal duty of the water company, after the extension of the city limits, to furnish the hospital water in the same manner and at the same rates it furnished it to others within the extended territory. *State ex rel. v. Eastin*, 193.

3. ———: **Extension of City Limits: Ordinances Applicable to Annexed Territory.** The rule that in all ordinary matters and things the ordinances of an annexing city are at once and automatically extended over the annexed territory does not affect existing private contracts which were not subject to regulation by ordinance at the time they were made. *Ib.*
4. **Ordinance: Void Only in Its Application.** An ordinance or statute may be void only in its application. A rate-fixing ordinance may be valid as to all consumers except to those to whom if applied it would impair or abrogate a valid existing private contract. *Ib.*
5. **Control by Public Service Commission.** The provisions of the present St. Louis charter which attempt to vest in the Board of Aldermen full power to regulate the construction, operation, charges and facilities of a public utility, not being a matter of purely local or municipal concern, must yield to the paramount authority of the statute investing such regulation in the Public Service Commission. *State ex rel. v. Public Service Comm.*, 429.

QUO WARRANTO.

1. **Consolidated School District: Welfare of Adjoining Districts: Substantial Evidence.** A *quo warranto* to have declared illegal the attempt to organize a consolidated school district, is a law case; and if there is substantial evidence that the County Superintendent made effort to obtain facts upon which he might exercise his judgment as to the needs for the district and as to the welfare of the adjoining district, the finding of fact by the trial court that he did all the statute required is binding on the appellate court. *State ex rel. v. Wright*, 376.
2. ———: **Increased Taxes: Fraudulent Representations of Superintendent.** Alleged fraudulent statements made to voters by the County Superintendent before the consolidated district was formed that their taxes would not be increased by its formation more than fifteen or twenty cents on the hundred dollars' valuation, has no place in a *quo warranto* brought against the directors to oust them on the ground that the district was not legally organized, for even if made they are no grounds for outlawing the district. *Ib.*

RAILROADS.

1. **Penalty Pendente Lite: Violation of Freight Law.** The penalty of treble-damages imposed by the Maximum Freight Rate acts of 1905 for an overcharge by a railroad company for the carriage of commodities was suspended during the pendency of the injunction suit brought by the carrier to enjoin the enforcement of the acts on the ground that the maximum rates fixed by them were confiscatory. *White v. Delano*, 16.
2. ———: ———: **Constitutional Right.** The constitutional right of any person whose property or liberty is affected by a statute to bring a suit to test its validity would be impaired and invaded if the penalties imposed by the statute for its violation could be

RAILROADS—Continued.

inflicted upon him for violations of the statute during the pendency of a suit brought in good faith. *Ib.*

3. ———: ———: **Right to Sue: Due Process.** The right to sue and defend in the courts is one of the highest and most essential privileges of citizenship, and a statute which imposes on a citizen penalties for bringing a suit to establish his constitutional rights, or that imposes a penalty for its violation during suit pending, would deny to him due process of law, for it would impair his constitutional right to "certain remedy for every injury to person, property or character." *Ib.*
4. **Suspension of Statute Pendente Lite: Overcharge of Freight Rates.** The Maximum Freight-Rate statutes of 1905, held to be invalid by the circuit court, but to be valid upon appeal to the Supreme Court of the United States, were not, as to the freight rates fixed by them nor as to overcharges, suspended during the pendency of the appeal. *Ib.*
5. **Damnum Absque Injuria: Overcharges for Freight Shipment: Result of Suit.** Overcharges for shipments of freight, made by a railroad company in violation of a statute during the time a suit of injunction to test the validity of the statute was pending, wherein the circuit court held the statute invalid and the Supreme Court on appeal held it to be valid, are not *damnum absque injuria*, as flowing directly from legitimate prosecution of the injunction; but such overcharges paid by the shippers belong to them, and may be recovered by them from the carrier. *Ib.*
6. **Overcharges: Charges Paid Connecting Carrier.** Where the consignees of a freight shipment were not located on defendant's railroad, and a connecting company transported the cars to the consignees, for a consideration charged to and paid by defendant, and by the defendant charged to and paid by the shipper, the defendant has no legal right to surcharge the shipper's account with such connecting charges, but when sued for the overcharges should be required to respond in damages for whatever overcharges it made and collected in excess of the rates fixed by the statutes. *Ib.*
7. **Negligence: Methods of Locking Switches: Conflicting Evidence.** Where the evidence as to the custom of railroads in locking switches is conflicting, there being no express rule on the subject, it will not be held as a matter of law that the method employed by defendant was that adopted and practiced by railroads generally, but the question is one of fact for the jury to determine. *Thompson v. Railroad*, 87.
8. ———: **Looking for Lever in Proper Notch: Contributory Negligence.** The switchman's testimony that as the car on which he was riding passed he looked at the switch points and they were in such position against the rails as to show the switch was set for the side track, and that they could not have been in the position in which they were unless the lever was down in the notch in the switch-stand, is evidence that the switch was set for the side track and that the lever was in the proper notch as the car on which he was riding approached the switch; and it was for the jury to determine whether, in failing to see and know that the lever was set in the proper notch, he was guilty of negligence contributing to the derailment caused by the car entering upon the wrong track at the switch. *Ib.*
9. ———: **Riding on Main-Line Side of Train.** Under the circumstances of this case, whether it was contributory negligence for

RAILROADS—Continued.

the switchman, riding on a car about to pick up another on a side track, to place himself upon the side of the car next to the main line, on which the train was standing, with which his car collided when the switch broke and it entered upon the main line, was a question for the jury. *Thompson v. Railroad*, 87.

10. ———: **No Switch Lock.** Likewise, under the circumstances, whether the railroad company, in view of the evidence tending to prove the likelihood of the lever jolting out of the notch at the switch-stand, was negligent in maintaining the switch without a lock and in running its cars over it at a rate of ten or twelve miles per hour, was a question for the jury. *Ib.*
11. ———: **Instruction: Absolute Safety.** An instruction which required the jury to find that the switch-stand where the car left the track was negligently maintained without a lock and that such switch-stand without a lock was not a reasonably safe place—if another instruction defined negligence as “a want of ordinary care” and then properly defined those words—did not require a verdict for the injured switchman unless the switch was absolutely safe. *Ib.*
12. ———: ———: **No Requirement of Conformity to Custom: Non-Direction.** Sufficient proof of usage in the matter of locking a switch and of conformity to custom, may be said to rebut the idea of negligence in a proper case; and an instruction which excludes the idea that the jury should consider the evidence tending to show the railroad company’s practice in leaving the switch unlocked conformed to the usage of well managed lines, would be erroneous; but an instruction which contains no particular direction, but does require a finding of negligence, does not exclude the consideration of such evidence, but amounts only to non-direction, which may be supplied or covered by instructions for defendant. *Ib.*
13. ———: ———: **Assumption of Risks.** If the rules of the railroad company pertain solely to main-line switches and do not require the switch of a cross-over track to be locked, the switchman does not assume the risk of injury resulting from a failure to lock the cross-over switch. *Ib.*
14. ———: ———: **Notice of Dangerous Situation: Crossing Tracks Necessary.** Having constructed its yard office a few feet south of the main track and necessarily making up its freight trains north of the main track, and it being necessary for conductors to obtain their orders and waybills from the yard office, the railway company was bound to know these employees must cross the main line in order to reach their trains about to be taken out. This was notice that such employees were likely to be upon or near the track next to the office. *Kippenbrock v. Railroad*, 479.
15. ———: ———: ———: **Running Train Without Warning or Headlight in Night Time.** And in these circumstances, and there being no particular point used or recognized as a crossing, it was negligence to run an overdue passenger train past the yard office, on the main line, on a dark night, through an unlighted yard, at a speed of thirty or thirty-five miles an hour, without sounding the bell or whistle, and without a headlight burning, particularly when the register in the office indicated the train had already passed, as was observed by the plaintiff freight conductor, who, having received his orders and waybills, had left the office and was proceeding to his freight train along the main line, when suddenly apprehending

RAILROADS—Continued.

his danger he leaped back, struck the office building and "re-bounded" against the train. Ib.

16. ———: **Headlight.** A headlight is a common and necessary means adopted by all railroads for the protection alike of those rightfully on the train, or on the track, or approaching it, in the night time, and to rapidly run a train through railroad yards in the night time without such headlight is negligence. Ib.
17. ———: **Lookout for Employees.** The rule that a railroad company is under no obligation to keep a lookout for employees who are aware of what is going on and are required to guard themselves from injuries naturally to be expected, has no application to an act or movement which is of unusual character and the unusualness of which reasonably may deprive the employee of an opportunity to protect himself. Ib.
18. ———: **Contributory: Crossing Track by Shortest Course.** The fact that the freight conductor on his way from the yard office across the main line to take his train, did not cross it directly, was at most evidence of contributory negligence, which is not a bar to an action for damages under the Federal Employers' Liability Act. Ib.
19. ———: **Boarding Moving Street Car: Contributory Negligence Per Se.** There is no cause of action against the carrier in favor of one who is injured as a result of his attempt to board a moving car if the carrier is guilty of no act of negligence beyond the mere fact that the car is moving at the time. In such case the person who attempts to board a car while it is in motion assumes the risk of injury from the ordinary movements of the car, but is not chargeable with negligence *per se*. *Gunn v. United Railways*, 517.
20. ———: ———: **After Slowing Down: Premature Start: Mental Excitement.** If a person, desiring to board a street car which merely slows down without stopping at a proper place or starts prematurely after having stopped, is laboring under great mental excitement, caused by facts which make it especially desirable and necessary to board the car at that place and such excitement is great enough to deprive him of the power to safely judge the dangers of the situation, and if the agents of the carrier know or under the circumstances are bound to be aware of such conditions of excitement, the carrier's failure to stop the car or to hold it a reasonable length of time is negligence, and the risk of injury from boarding the moving car is not assumed by such person; but if he is not laboring under such excitement, and is not directed by the carrier's agent to enter, he cannot recover for injuries caused by ordinary movements of the car. Ib.
21. ———: ———: **When Plaintiff May Recover.** A person seeking to recover damages for injuries received while boarding or leaving a moving street car, must show that the carrier caused him to be put in a dilemma, such as to cause excitement of mind rendering him for the moment unable to properly choose between two courses of action, or that the carrier's agents made some order, request or direction that he board or leave the car, or that there was some sudden shock or acceleration of speed of the car while he was getting on or off; or some defect in the car which increased the danger, or some other facts showing negligence of the carrier other than the mere fact that the car was in motion when he made the attempt to board or leave it. Ib.

RAILROADS—Continued.

22. ———: ———: ———: **No Contributory Negligence.** A person not under unusual excitement who attempts without invitation to board a moving street car after it has started in ordinary movement, cannot recover for injuries so received, regardless of the question of whether he was himself guilty of negligence, even though the car after having been stopped was started without giving him reasonable time to board it. *Gunn v. United Railways*, 517.
23. ———: ———: **Act of Entering: When a Passenger: Instruction.** One who has hold of the rail or has a foot on the step for the purpose of entering is in the act of entering the car. Nor is it the law that in all cases a person must have hold of the rail or have a foot on the step in order to be in the act of entering. If he intends to take passage on a street car and has hailed it for that purpose, and it has been stopped to enable him to enter, he is to be regarded as a passenger while he is in the act of carefully and prudently attempting to step upon the platform. So the carrier is not entitled to an instruction telling the jury that if when plaintiff took hold of the hand rail the car was moving, he cannot recover. *Ib.*
24. **Rates: Power of Public Service Commission.** Section 47 of the Public Service Commission Act, Laws 1913, p. 583, confers upon the Commission authority to raise railroad rates above the maximum theretofore fixed by the Legislature. *State ex rel. v. Pub. Serv. Comm.*, 547.
25. ———: **General Powers of Legislature.** The General Assembly may pass any law upon any subject not forbidden by the organic law. That power is conferred by section 1 of article 4 of the Constitution, which says that "the legislative power, subject to the limitations herein contained, shall be vested in a Senate and House of Representatives, to be styled 'the General Assembly of the State of Missouri.'" Pursuant to this general power to enact legislation, the General Assembly had enacted laws fixing maximum passenger and freight charges prior to the incorporation of section 14 of article 12 in the Constitution of 1875 which explicitly conferred the power of "establishing reasonable maximum rates." [Explaining statements in *State v. M. K. & T. Ry. Co.*, 262 Mo. 1. c. 522.] *Ib.*
26. ———: **Power of Legislature.** The General Assembly has power to fix reasonable maximum rates for the carriage of freight and passengers, in the absence of any specific authority such as is contained in section 14 of article 12 of the Constitution explicitly conferring the power. *Ib.*
27. ———: ———: **Delegation of Power.** The power of prescribing maximum rates for common carriers, which the Legislature inherently possesses, may be delegated to a railroad commission or to a public service commission, unless inhibited by express constitutional provision. And if the fixing of rates is to proceed intelligently along lines of fairness to all concerned—to passenger, shipper, carrier, laborer and the public—with due regard to constant mutations in costs of labor and the amount of traffic, the matter should be delegated to a body having time for investigation and aided by expert machinery and having greater flexibility than a short-term Legislature possesses. *Ib.*
28. ———: ———: **Constitutional.** Although by doing so it repealed existing statutes fixing maximum rates, the Legislature was not inhibited by the provision of the Constitution declaring that "the General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and

RAILROADS—Continued.

passenger tariffs on the different railroads in the State, and shall from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on said railroads" from creating the Public Service Commission and directing it, after a hearing and proper expert investigation, to ascertain what maximum rates are reasonable and fix the same by an order, and declaring that said rates so ascertained and fixed should "thereafter be observed" by the railroads. The Legislature did not thereby delegate to the Commission the absolute power of fixing maximum rates, but only the power to ascertain and determine what rates are reasonable, and it is those rates that the General Assembly "established"—subject all the time to review by the courts as to their reasonableness.

Held, by BOND, J., dissenting, that since the General Assembly did exercise its exclusive power to establish and fix maximum rates, it could not thereafter exercise it again except through the medium of its own power as a legislative body; and since the Constitution says that the General Assembly shall establish maximum rates, it was powerless to delegate the power to any commission, and to do so is to contravene this constitutional provision. *Ib.*

29. **Interstate Shipments: Governed By U. S. Laws.** The liability of a common carrier upon contracts concerning interstate shipments is governed by the Interstate Commerce Act and amendments thereto; and the construction of that act by the Federal courts is conclusive upon State courts. *Lumber Co. v. Railroad*, 629.
30. ———: **Bonus or Refund on Interstate Shipments for Increase in Business.** A contract between a lumber company, about to locate large mills, and a railroad company desiring to have them located upon its lines in order that it might receive the manufactured lumber for shipment and the increase in traffic which would result from the building up of a new town, by which the railroad company agreed in consideration of the erection of the mills at a designated point on its lines, to give to the lumber company an amount equal to half of the freight charges received by the railroad on interstate shipments of machinery and materials that went into the construction of the plant, was in violation of the Interstate Commerce Act, even prior to the amendment of 1906, whether said amount to be given or paid be considered a bonus graduated on the amount of shipments done, or a refund or drawback on rates paid, or reduced rates. *Ib.*
31. ———: ———: **Other Inducements: Promotion of Public Enterprises: Device.** The contention that the giving to a lumber company an amount of money equal to one half the freight charges received on all materials that went into the construction of its big mills in consideration of its location of its plant along the line of defendant's railroad, was not a rebate or drawback in freight rates, but merely the promotion of a public enterprise which would redound to the prosperity of the railroad, namely, the aiding in building up a town which would grow in public importance, with consequent demands for increased freight and passenger transportation, cannot be sustained, because the Interstate Commerce Act prohibits any device or indirect method of enforcing higher charges against one shipper than another, and has for its chief design the prevention of any discrimination among shippers that, by reason of rebates or drawbacks and the advantages derived from them, will enable large dealers to crush out or cripple smaller competitors who have no such advantages; and a bonus to a favored shipper is a discriminatory device. *Ib.*

RAILROADS—Continued.

32. **Evidence: Established Rates.** A stipulation 's the agreed statement of facts that the rates charged and paid by the shipper were the "regular, published tariff rates" is evidence that the rate the shipper paid was the "legally established and published rate" and sufficient in an action arising on account of a discrimination in violation of the Interstate Commerce Act, although there was no evidence that the rates were filed with the Interstate Commerce Commission and posted. *Lumber Co. v. Railroad*, 629.

REHEARING.

Appellate Practice: Rehearing Granted: Immediate Decision Without Rehearing. After a Court of Appeals has granted a motion for a rehearing, it cannot at the same time and immediately without a rehearing and without a re-submission, render judgment. When a rehearing is allowed the case stands for re-argument and re-submission, and a judgment rendered without re-submission is *coram non judice* and void.

Held, by BOND, J., dissenting, that the Court of Appeals had jurisdiction of the cause, and its judgment was at its worst a mere erroneous exercise of that jurisdiction, and in no sense a violation of the constitutional power vested in it to decide cases; and one of the judges of that court, deeming the judgment to be in conflict with certain designated decisions of the Supreme Court and of another court of appeals and having for that reason caused the case to be certified to the Supreme Court, that certification gave this court jurisdiction of the whole case, and it is before the Supreme Court for determination on the merits, just as if it had been brought to it by direct appeal from the circuit court, in total disregard of the error by which the judgment was reached in the Court of Appeals. *Paving Co. v. Realty & Imp. Co.*, 698.

RES ADJUDICATA.

1. **Law of Case: Different Suit.** Whether or not it be true that the law as declared by the court on one appeal continues to be law of that case upon a subsequent appeal, the rule has no application to a new and separate action. *State ex rel. v. Eastin*, 193.
2. ———: ———: **Mandamus: Demurrer Sustained.** If it no where appears in the alternative writ that a suit by mandamus has previously been brought, and the facts of a former suit are not set forth therein, an appeal from the ruling of the trial court sustaining a demurrer to the alternative writ is not a second appeal, and hence it cannot be held that the rulings on appeal in a former mandamus case have become the law of this second suit. *Ib.*

REVENUE OF COUNTY. See *Roads and Highways*.

REVIVOR OF ACTION. See *Abatement*.

ROADS AND HIGHWAYS.

1. **Public Road Fund: Devoted to Other Uses.** Section 10481, Revised Statutes 1909, in declaring that the tax of not more than twenty cents authorized by it to be credited to the road district from which said tax is collected shall constitute the road fund of the several road districts of the county, forbids the county court to devote the fund to other uses. *Road District v. Ross*, 76.
2. ———: **Discretion of County Court.** The county court has no discretion as to the levying of at least ten cents on the hundred

ROADS AND HIGHWAYS—Continued.

dollars directed by the amendment of 1913 to section 10481, Revised Statutes 1909; its duty to levy and appropriate at least that much to special road districts is compulsory, and it can divert the tax to no other purpose. Its discretion under that section and amendment pertains only to the levy of an additional tax of ten cents on the hundred dollars' valuation. *Ib.*

3. ———: **Meaning of Statutes.** The theory of the statutes (Secs. 10481 and 10483, R. S. 1909) is: (1) that the bridges and roads are to be first taken care of, so far as that duty is devolved upon the districts, by the constitutional levy for county purposes, to the extent at least of ten cents on the hundred dollars' valuation; (2) if that amount is not sufficient for such purpose the county court may raise it to twenty cents; and (3) in its discretion, it may levy the whole or any part of the twenty-five cent special levy authorized by the constitutional amendment of 1908, to be expended in such manner and through such agencies as are charged by law with the establishment, construction and maintenance of roads and bridges. *Ib.*
4. ———: **Transfer to Other Funds: Modified by Road Laws.** Section 3786, Revised Statutes 1909, declaring that "whenever there is a balance in the county treasury to the credit of any special fund, which is no longer needed for the purposes for which it was raised; the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance," is still live law as to all the revenue of the county remaining within the control of the county court; but the road fund has by later enactments been removed from the court's control and entrusted to other agents, to be expended by them for a definite purpose. *Ib.*
5. ———: **Diverted to Other Funds.** Revenue for other county purposes cannot be increased at the expense of the roads. The county court having made a levy of fifty cents on the hundred dollars for county purposes, the maximum tax it is permitted by the Constitution to levy for those purposes, cannot divert ten cents on the hundred dollars of it to other county purposes, but so much of the fifty cents as is collected from property within a special road district as is levied for road purposes must be credited to the treasurer or commissioners of such district. *Ib.*
6. ———: **Discretionary Powers of County Court.** The Legislature has no power to compel the county court to levy the twenty-five-cent tax on the hundred dollars authorized by the constitutional amendment of 1908, but if the tax is levied the county court can apply it to road and bridge purposes, but to no others. But the county court is compelled to levy at least ten cents on the hundred dollars under Sec. 10481, R. S. 1909, for road purposes, and that much at least of the general revenue of the county it must apply to the road districts from which the tax arises, to be spent, not by it, but by the agencies which the statute designates. *Ib.*
7. **County Taxes: Road Purposes.** The county court in counties in which the assessed valuation of properties is less than six millions, may levy fifty cents on the hundred dollars for county purposes, and set aside fifteen cents of it to improvement of roads; and it can in addition to the fifty cents, levy an additional tax not exceeding twenty-five cents to be used for road-and-bridge purposes but for no other purpose. *State ex rel. v. Railroad, 251.*

ROADS AND HIGHWAYS—Continued.

8. ———: ———: **Twenty-Five-Cent Levy: Divided Into Two: County Purposes.** The county court levied fifty cents on the hundred dollars' valuation for county purposes, and divided it into five funds, distributing fifteen cents to the fund "for the payment of all necessary expenses incurred in the building and repairing of roads and bridges." The further words of the levy were: "It is further ordered that a property road tax of twenty cents on each one hundred dollars' valuation on all property made taxable by law for road purposes be levied and collected for the use and benefit of the respective road districts of the county, when collected to be placed to the credit of said road districts for the purposes specified in the statutes. It is further ordered that a property road-and-bridge tax of five cents on the hundred dollars' valuation be levied on all property made taxable by law, and when collected to be placed to the credit of said Road-and-Bridge Fund as provided by law." *Held*, that the first appropriation of fifteen cents was made in pursuance of the statute as the proportion of the road fund to be derived from the general revenue arising from the maximum levy of fifty cents for county purposes; and the other two levies of twenty and five cents were made under the constitutional amendment of 1908 and Sec. 10482, R. S. 1909, and while no good reason is apparent why the aggregate levy of twenty-five cents should have been thus divided into two, they were both made for the one purpose contemplated by that constitutional amendment and both were legal, and the levy of twenty cents cannot be disposed of as a levy for "county purposes" under section 11 of article 10 of the Constitution. *State ex rel. v. Railroad*, 251.
9. ———: ———: ———: **Not Designated as Special Tax.** The constitutional amendment (Sec. 22, art. 10, Constitution) does not require the name by which the "special tax" of twenty-five cents for road purposes is authorized, to be specified as a part of the record order levying it. The fact that it is levied nominally "for road and bridge purposes" and that it is in excess of the tax authorized by section 11 of article 10 of the Constitution, fixes its status as a special tax, and limits its use when collected. It is only necessary that it should be levied separately from and "in addition to" the levy "authorized for county purposes" and that it should appear to be "for road and bridge purposes." *Ib.*
10. ———: ———: ———: **Use for Other Purposes: Agency Expending It.** The twenty-five cent road tax authorized by the constitutional amendment of 1908 cannot be used for any other purpose than for roads and bridges, but neither the amendment nor the statute designates the particular agency, among those lawfully charged with the duties to which the purpose pertains, by whom it is to be expended. *Ib.*
11. **Public Road Bonds: Maximum County Indebtedness: Five Per Cent Limit: Legislative Exercise.** A county may incur an indebtedness in excess of five per cent of its assessed taxable wealth for the purpose of improving public roads in the county. By the amendment to the Constitution adopted in 1906 the theretofore existing maximum limit of five per cent upon the amount of county bonded indebtedness for road purposes, was removed; and Sec. 10520, R. S. 1909, enacted in 1907, Laws 1907, p. 411, authorized the exercise by the county of the constitutional power conferred by that amendment. *State ex rel. v. Hackman*, 658.
12. ———: **Court Order: What Are Public Roads.** The order of the county court containing a recital that the proceeds of the bond

ROADS AND HIGHWAYS—Continued.

issue shall "be used for the improvement of the public roads of the county" is an essential prerequisite to a valid election under the Act of 1907; but the words "of the county," when compared with the rest of the act and the constitutional amendment of 1906, mean the public roads "in the county;" and since the word "road" is a generic term and includes highways and even streets, the proceeds of the bond sales may be used to improve public roads within unincorporated villages and towns which are connecting links between roads lying outside their limits, and also the roads lying within existing special road districts, and the court order may so declare.

Held by WALKER, J., dissenting, with whom FARIS, J., concurs, that a public road means a highway outside the corporate limits of a city or town, while a street means a highway within such limits; and when the term "public road" is used in a statute, a strict compliance with which is necessary to authorize the incurring of an added burden of taxation, it cannot be held to include streets within an incorporated city or town unless that purpose is expressed in the statute with particularity. *Ib.*

13. ———: **Use on City Streets: A County Use.** Proceeds from an issue of bonds by a county to improve the public roads in the county, under the constitutional amendment of 1906 and the Act of 1907, may be used in improving parts of city or village streets which form a part of the system of the public roads to be improved. The use of the fund for improving portions of the city streets that form connecting links in the connected system of public roads in the county is for a county use or purpose, and not a purely municipal purpose, and is vastly different from turning over a part of the fund to city treasuries to be used in improving streets. [Distinguishing *State ex rel. Kirkwood v. County Court*, 142 Mo. 575, and *Green City v. Martin* 237 Mo. 1. c. 484; and disapproving *obiter dictum* in *State ex rel. St. Louis County v. Gordon*, 268 Mo. 713.]

Held, by WALKER, J., dissenting, with whom FARIS, J., concurs, that the streets of an incorporated city or town are not within the purview of the Act of 1907. *Ib.*

14. ———: ———: **Control Over Fund.** Whether the authorities of cities or existing special road districts have exclusive control over the streets and public roads within their respective territories, or whether the county court has authority to make the proposed improvements in the streets and roads therein, contemplated by the proposed county bond issue, does not affect the validity of the bonds, and is not for determination in adjudicating their legality. *Held*, by WALKER, J., dissenting, with whom FARIS, J., concurs, that in the absence of a statute specifically so providing, the county court has no authority to interfere with the care and maintenance of streets in incorporated towns or to extend aid to the municipality in the improvement of their streets. *Ib.*

SCHOOLS.

1. **Consolidated School District: Plat: Certainty.** Absolute mathematical certainty in lines and scale in the plats of a proposed consolidated school district required by the statute to be made and posted by the County Superintendent, who is not a surveyor and who is given no fund with which to cause a survey to be made, is not to be expected. *State ex rel. v. Wright*, 376.
2. ———: ———: **Sufficiency: Purpose.** The plat of the proposed consolidated school district is sufficiently exact within the meaning of

SCHOOLS—Continued.

the statute if it shows the sections and subdivisions of lands in a manner sufficiently accurate to enable the ordinary citizen to ascertain from an examination thereof whether the boundaries of the proposed district will include his residence or lands so as to make him a voter and a taxpayer in the district. If it does that, and likewise enables the County Clerk to intelligently extend and the Collector to intelligently collect the taxes on the subdivisions of real estate included, it contains all that is necessary. *State ex rel. v. Wright*, 376.

3. ———: ———: ———: **Bounded by River.** Whether or not the posted plats make the boundary line of the proposed consolidated school district cross the southeast corner of a certain section, or to run thirteen links from the corner, is immaterial, if a certain river or well-known water course is there made the boundary line. *Ib.*
4. ———: **Welfare of Adjoining Districts: Judgment of Superintendent.** In fixing the boundary lines in such a way as in the judgment of the County Superintendent "will form the best possible consolidated district," the statute leaves both the measure of the judgment and the quantum of due regard for the welfare of adjoining districts to his sound official discretion; and the sole way of correcting his exercise of a bad judgment and discretion is the rejection by the voters of the proposition to organize the consolidated district. *Ib.*
5. ———: ———: **Quo Warranto: Substantial Evidence.** A *quo warranto* to have declared illegal the attempt to organize a consolidated school district, is a law case; and if there is substantial evidence that the County Superintendent made effort to obtain facts upon which he might exercise his judgment as to the needs for the district and as to the welfare of the adjoining district, the finding of fact by the trial court that he did all the statute required is binding on the appellate court. *Ib.*
6. ———: **Increased Taxes: Fraudulent Representations of Superintendent.** Alleged fraudulent statements made to voters by the County Superintendent before the consolidated district was formed that their taxes would not be increased by its formation more than fifteen or twenty cents on the hundred dollars' valuation, has no place in a *quo warranto* brought against the directors to oust them on the ground that the district was not legally organized, for even if made they are no grounds for outlawing the district. *Ib.*
7. **Village or Town School District: Division Into Two or More Districts.** Section 10881, Revised Statutes 1909, does not provide a way for dividing a town, city or consolidated school district into two or more districts. Nor do any other statutes provide any direct way by which such division can be accomplished. *State ex inf. v. Sweaney*, 685.

SELLING LIQUORS IN LOCAL OPTION COUNTIES. See *Injunctions*, 6 to 11.

SERVICE. See *Process*.

SEWERS.

1. **Taxation of Agricultural Lands.** Notwithstanding plaintiff's lands are used largely for agricultural and garden purposes, have not been platted into blocks and lots, constitute 160 of the 1600 acres in the sewer district, and the tax against them to construct the

SEWERS—Continued.

main sewer will be \$36 per acre, and if constructed no laterals from it through the lands are at present contemplated, yet if there are 3500 inhabitants residing within the district, there are churches, schools and hospitals, the sewer is to be constructed along the course of natural drainage, the district is now totally without sewers and there is no other feasible method for draining the lands included therein, and these agricultural lands within the city limits when laterals are constructed can be drained by the main sewer, its construction will not be enjoined on the ground that the ordinances authorizing it are unreasonable and oppressive. *Whitsett v. Carthage*, 269.

2. ———: **Public Health.** All persons hold their property subject to the laws providing for the public health, safety, morals and general welfare; and if a main sewer is necessary for the public health of a large portion of a city, and will benefit not only the parts densely populated but in time the agricultural lands included in the district also, the owners of such lands cannot enjoin its construction on the theory that it is not necessary for the present enjoyment and use of those lands, they cannot be immediately served by it, and the costs to be taxed against them will be very heavy, possibly confiscatory. *Ib.*
3. **Benefits.** It is not only benefits to real estate that are to be considered in sewer construction. Primarily the benefits are conferred on all the people of a district, through sanitation and health conservation, and secondarily on the real estate taxed with the cost, in that it is made more desirable for business and residential purposes and increased in value. *Ib.*
4. ———: **Laterals.** The owners of land not reached by lateral sewers are benefited by laterals which connect other improved lands in the district with the main sewer, since they serve to drain away the refuse that would endanger the public health. *Ib.*
5. **Laterals: Time of Construction.** The law does require all lateral sewers of a drainage district to be constructed at the same time. They may be constructed as the necessity for them arises, and not before. *Ib.*
6. **Taxes in Proportion to Benefits.** The facts that the benefits to lands taxed with the costs of a sewer do not exactly equal such costs will not invalidate the construction or the tax bills. Approximate equality is all the law requires. *Ib.*
7. **City Extension: Validity.** A contention that the city limits were not legally extended to embrace the lands to be taxed with the costs of constructing a main sewer because no notice of the election was given, will not be considered, if fifteen years have elapsed since the extension was made. *Ib.*
8. **Special Tax Bill: Sewer District: Description by Parcels Instead of by Entire Enclosure.** Where the charter provided for the issuance of a "special tax bill against each lot or parcel of ground in the joint sewer district, giving the name of the owner," and declared that "the word 'lot' as used in this section shall be held to mean the lots as shown by recorded plats of additions or subdivisions, but if . . . the owners of property have disregarded the lines of lots as platted, and have treated two or more lots or fractions thereof as one lot, then the whole parcel of ground or lots so treated as one, shall be regarded as a lot," tax bills which describe the property by subdivisions and boundaries according to the re-

SEWERS—Continued.

corded plan are not void, although the area (Semple Place) covered by the plat has been sold as a body under a prior deed of trust, if there is substantial evidence that there were "parcels of ground" substantially commensurate with the subdivisions outlined in the recorded plat and that they had been so treated by the owners; and there being substantial evidence to support the finding of the trial court on the question, it is not for review on appeal. *Construction Co. v. Realty Co.*, 450.

SHERIFF'S DEED. See *Conveyances*, 3 and 4.

SPECIFIC PERFORMANCE.

Lease: Parol Agreement: Part Performance: Possession. The retention of possession of land by a lessee after the expiration of his written lease, under a parol contract made by the landlord, while he was yet in possession, to lease to him for another year, will take the case out of the Statute of Frauds and authorize compulsory specific performance, only when such retention of possession is pursuant to and referable solely to the parol contract. Mere continuance of possession does not constitute part performance. Hence the expression by the Court of Appeals, in *Winter v. Spradling*, 163 Mo. App. 77, that "there would be nothing inconsistent in the defendant [tenant] holding possession under both the written and verbal leases at the same time," is condemned. *Shacklett v. Cummins*, 496.

STATUTE OF FRAUDS.

Lease: Parol Agreement: Part Performance: Possession. The retention of possession of land by a lessee after the expiration of his written lease, under a parol contract made by the landlord, while he was yet in possession, to lease to him for another year, will take the case out of the Statute of Frauds and authorize compulsory specific performance, only when such retention of possession is pursuant to and referable solely to the parol contract. Mere continuance of possession does not constitute part performance. Hence the expression by the Court of Appeals, in *Winter v. Spradling*, 163 Mo. App. 77, that "there would be nothing inconsistent in the defendant [tenant] holding possession under both the written and verbal leases at the same time," is condemned. *Shacklett v. Cummins*, 496.

STATUTES CITED AND CONSTRUED.**Revised Statutes 1909.**

Section 101, see page 606.	1754, see pages 233, 234,
104, see page 607.	235, 236, 237.
105, see page 607.	1788, see page 225.
309-331, see pages 354, 358.	1789, see page 226.
310-314, see pages 359, 360.	1791, see page 225.
322, see page 361.	1884, see page 246.
323, see page 361.	1895, see page 117.
537, see page 626.	1912, see pages 509, 513.
555, see page 604.	515.
579, see page 395.	1916, see page 605.
583, see page 395.	2029, see pages 689, 690.
651, see pages 695, 696.	2032, see pages 256, 260.
658, see page 695.	2038, see pages 173, 174.
1751, see pages 233, 235,	2100, see page 375.
236, 237.	2133, see pages 509, 513.

STATUTES CITED AND CONSTRUED—Continued.

- Section 2239, see page 66.
 2298, see page 460.
 2371, see page 143.
 2535, see page 124.
 2559, see page 299.
 2757, see pages 342, 343, 344.
 3241, see page 39.
 3241-2, see page 20.
 3316, see page 447.
 3786, see page 84.
 4651, see page 61.
 4818, see pages 333, 335.
 5425, see pages 418, 419, 420, 424, 429, 657.
 5426, see page 657.
 5427, see page 657.
 5578-5635, see page 468.
 5588, see page 468.
 5601, see page 468.
 5828, see pages 189, 190, 191, 192.
 5909, see page 348.
 5924, see pages 223, 342.
 6149, see page 217.
 6704, see page 301.
 6708, see page 301.
 6713, see page 299.
 6714, see pages 300, 302, 304.
 6944, see page 318.
 6946, see page 316.
 6947, see page 316.
 6948, see page 316.
 6949, see page 316.
 7227, see pages 107, 108.
 7228, see pages 104, 108, 109.
 7229, see page 108.
 7243, see page 108.
 7633, see pages 342, 343.
 7674, see page 500.
 7997, see page 245.
 8057, see pages 184, 188.
 8286, see page 473.
 8287, see pages 473, 474.
 9081, see page 204.
 9281-9298, see pages 275, 279.
 9282, see page 282.
 9703, see pages 511, 513.
 9704, see pages 511, 512.
 9840, see page 598.
 9848, see page 458.
 9849, see page 458.
 10481, see pages 80, 81, 82, 83, 86, 87, 254, 262, 263, 266, 267.
 10482, see pages 81, 83, 86, 264, 267, 269.
 10483, see pages 81, 83.
 10520, see pages 663, 664, 666, 667, 670, 674, 675.
 10576-10586, see page 78.
 10801, see page 87.
 10837, see pages 687, 690, 691, 692.
 10839, see pages 690, 693.
 10840, see pages 690, 693.
 10870, see page 692.
 10881, see pages 687, 690, 691, 692, 693.
 11322, see pages 136, 137.
 11392, see page 154.
 11397, see page 149.
 11422, see page 266.
 11423, see pages 78, 261, 263, 265, 266.
 11425, see pages 154, 155.
 11432, see pages 180, 182, 184, 188, 189, 191.
 11448, see page 192.
 11544, see page 157.
 11549, see pages 150, 153.
 11647, see page 45.
 11769, see page 264.
 Ch. 17, art. 2, see page 149.
 Ch. 21, art. 10, see page 605.
 Ch. 28, see pages 343, 344.
 Ch. 41, art. 4, see page 468.
 Ch. 117, art. 5, see page 149.

Revised Statutes 1899.

- Section 647, see page 374.
 650, see page 375.
 2866, see page 657.
 6359, see page 512.
 6360, see page 512.
 8278, see page 131.
 8288, see page 468.
 8292, see pages 166, 167.
 8300, see page 468.
 8331, see page 169.
 8337, see page 478.
 8369, see page 478.
 9283, see page 263.
 9436, see page 86.
 10184, see page 136.
 10188, see page 136.
 10207, see pages 125, 137.
 Ch. 122, art. 4, see pages 168, 468, 472, 477, 478.
 Ch. 122, art. 5, see page 478.
 Ch. 122, art. 7, see page 478.

STATUTES CITED AND CONSTRUED—Continued.

Revised Statutes 1889.

Section 2092, see pages 374, 375.

Revised Statutes 1879.

Section 736, see pages 226, 227. 3505, see page 226.
751, see page 227. 3506, see page 227.
2400, see page 66.

General Statutes 1865.

Page 340, secs. 30 and 31, see page 559.

Revised Statutes 1855.

Page 377, see page 234.
Page 1220, see page 234.

Laws 1913.

Pages 235-240, see page 165.
Page 241, sec. 16, see pages 162, 163.
Pages 271 and 281, see page 472.
Page 323, see page 218.
Page 583, sec. 47, see pages 555, 557, 558, 559, 562,
566, 567, 581, 582, 583.
Page 588, sec. 49, see pages 438, 442, 446.
Page 599, sec. 63, see page 582.
Page 640, secs. 110 and 111, see page 582.
Page 668, see page 82.
Page 721, see page 380.
Page 722, sec. 3, see page 384.

Laws 1911.

Page 139, see page 688.

Laws 1909.

Page 704, see pages 458, 459.
770, see page 692.
819, sec. 130, see page 691.

Laws 1907.

Page 170, see page 560.
171, see page 560.
252, see page 657.
411, see page 666.

Laws 1905.

Page 102, see page 560.
135, see page 421.
182, sec. 8284, see page 472.
182, sec. 8288, see page 474.
185, see page 167.
185, sec. 8292, see page 475.
187, sec. 8298, see page 476.
190, secs. 8301, 8301a, see pages 476, 477.
272, see pages 184, 188, 191.

STATUTES CITED AND CONSTRUED—Continued.

Laws 1903.

Page 234, see page 131.
235, see page 167.

Laws 1897.

Page 74, see pages 374, 375.

Laws 1887.

Page 42, see page 512.
Pages 186, 187, see page 63.

Laws 1875.

Page 112, see page 560.

Laws 1871.

Page 105, sec. 104, see page 186.

Laws 1863.

Page 48, see page 559.

Laws 1857 (Adj. Sec.).

Page 32, see page 242.

Laws 1856.

Page 464, see page 243.

Laws 1855.

Page 181, see page 134.
Pages 474, 538, 625, see page 133.

Laws 1848.

Page 120, see page 133.

Laws 1845.

Page 299, see page 131.

Laws 1843.

Page 69, see page 133.

Laws 1841.

Page 114, see page 133.

Laws 1839.

Page 81, see page 133.

STATUTES AND STATUTORY CONSTRUCTION.

1. **Penalty Pendente Lite: Violation of Freight Law.** The penalty of treble-damages imposed by the Maximum Freight Rate acts of 1905 for an overcharge by a railroad company for the carriage of commodities was suspended during the pendency of the injunction suit brought by the carrier to enjoin the enforcement of the acts on the ground that the maximum rates fixed by them were confiscatory. *White v. Delano*, 16.

STATUTES AND STATUTORY CONSTRUCTION—Continued.

2. ———: ———: **Constitutional Right.** The constitutional right of any person whose property or liberty is affected by a statute to bring a suit to test its validity would be impaired and invaded if the penalties imposed by the statute for its violation could be inflicted upon him for violations of the statute during the pendency of a suit brought in good faith. *White v. Delano*, 16.
3. ———: ———: **Right to Sue: Due Process.** The right to sue and defend in the courts is one of the highest and most essential privileges of citizenship, and a statute which imposes on a citizen penalties for bringing a suit to establish his constitutional rights, or that imposes a penalty for its violation during suit pending, would deny to him due process of law, for it would impair his constitutional right to "certain remedy for every injury to person, property or character." *Ib.*
4. **Suspension of Statute Pendente Lite: Overcharge of Freight Rates.** The Maximum Freight-Rate statutes of 1905, held to be invalid by the circuit court, but to be valid upon appeal to the Supreme Court of the United States, were not, as to freight rates fixed by them nor as to overcharges, suspended during the pendency of the appeal. *Ib.*
5. **Public Road Fund: Devoted to Other Uses.** Section 10481, Revised Statutes 1909, in declaring that the tax of not more than twenty cents authorized by it to be credited to the road district from which said tax is collected shall constitute the road fund of the several road districts of the county, forbids the county court to devote the fund to other uses. *Road Dist. v. Ross*, 76.
6. ———: **Discretion of County.** The county court has no discretion as to the levying of at least ten cents on the hundred dollars directed by the amendment of 1913 to section 10481, Revised Statutes 1909; its duty to levy and appropriate at least that much to special road districts is compulsory, and it can divert the tax to no other purpose. Its discretion under that section and amendment pertains only to the levy of an additional tax of ten cents on the hundred dollars' valuation. *Ib.*
7. ———: **Meaning of Statutes.** The theory of the statutes (Secs. 10481 and 10483, R. S. 1909) is: (1) that the bridges and roads are to be first taken care of, so far as that duty is devolved upon the districts, by the constitutional levy for county purposes, to the extent at least of ten cents on the hundred dollars' valuation; (2) if that amount is not sufficient for such purpose the county court may raise it to twenty cents; and (3) in its discretion, it may levy the whole or any part of the twenty-five cent special levy authorized by the constitutional amendment of 1908, to be expended in such manner and through such agencies as are charged by law with the establishment, construction and maintenance of roads and bridges. *Ib.*
8. ———: **Transfer to Other Funds: Modified by Road Laws.** Section 3786, Revised Statutes 1909, declaring that "whenever there is a balance in the county treasury to the credit of any special fund, which is no longer needed for the purposes for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance," is still live law as to all the revenue of the county remaining within the control of the county court; but the road fund has by later enactments been removed from the

STATUTES AND STATUTORY CONSTRUCTION—Continued.

court's control and entrusted to other agents, to be expended by them for a definite purpose. *Ib.*

9. **Money Had and Received: Payment: Before Work is Done: Work Done Before Suit: Purpose of Extension on Assessment Book.** The statute (Sec. 11549, R. S. 1909) which allows compensation to the county clerk for "services rendered" in "extending the taxes on the assessment book" does not designate the time within which the work is to be done, nor fix a penalty for failure to do it before making out and delivering the tax book to the collector, and the act is such that the time of its performance has no effect upon the validity of the tax, and is important only (1) as an aid to the clerk in correctly extending the taxes upon the tax book and (2) as a permanent public record of the amount of the tax in accordance with the final orders of the county and state boards; and in an action by the State to recover back money from the county clerk, paid by the State Auditor before the work of extending the taxes on the assessment book was done, but which was done before the action was instituted, there can be no recovery on the theory either (1) of enforcing a penalty for not doing the work sooner or (2) that the payment having been made the duty to do it ceased and its performance thereafter was a work of supererogation. *State ex rel. Scott, 146.*
10. **Election Contest: Interlocutory Notices: Service by Private Person.** Section 1791, Revised Statutes 1909, declaring that "service of any notice required by this chapter may be made by any sheriff, marshal or constable, or by any person who would be a competent witness," does not refer to the notice or summons which brings a party into court for the purpose of forcing him to submit to a trial, such as a defendant in an ordinary civil action or a contestee in an election contest, but refers only to interlocutory notices, that is, notices required to be given in the progress of a cause. *State ex rel. v. Robinson, 212.*
11. **Inclusion of Things Existent and Subsequent: Corporations.** A statute general in terms may be made to apply to conditions non-existent at the time of its enactment. If expressed in words of the present tense it will generally be construed to apply not only to things and conditions existing at its passage, but will also be given a prospective interpretation and applied to such as come into existence thereafter. Sec. 1754, R. S. 1909, stating the venue of suits against corporations, embraces foreign corporations, even though it be admitted that they could not have been served with process in this State at the time of its enactment in 1855. *State ex rel. v. Jones, 230.*
12. **Venue: Foreign Corporation: Governed by Section 1754: Non-Resident.** The venue of a suit against a foreign industrial corporation licensed to do business in this State is governed by section 1754, Revised Statutes 1909, and therefore it is not necessary or proper to construe the term "non-residents" used in the fourth subdivision of section 1751. [*Distinquishing Stone v. Insurance Co., 78 Mo. 655, and N. Y., L. E. & W. Railroad Co. v. Estill, 147 U. S. 591.*] *Ib.*
13. **Limitations: Swamp Lands: Sec. 7997.** The purpose of the last proviso to Sec. 7997, R. S. 1909, was to establish title by prescription in patentees of swamp land conveyed by the county court prior to 1880, who had claimed and paid taxes for more than twenty years. The act had no retroactive operation, and did not prejudice the title which had been conveyed by patent by the county to a private citizen prior to its enactment. *Carson v. Lumber Co., 238.*

STATUTES AND STATUTORY CONSTRUCTION—Continued.

14. **Homestead: In Partition: Governed by Section 6713: Power of Court.** Since the Partition Act is silent as to homesteads, resort must be made to section 6713, Revised Statutes 1909, which is a part of the Homestead Statutes, whenever lands in which a homestead exists are brought into partition. Under that statute the only power the court has is to sever it from the balance of the real estate sought to be partitioned. *Dalton v. Simpson*, 287.
15. ———: ———: **Section 6714.** The Legislature meant, by Sec. 6714, R. S. 1909, which authorizes the sale of the homestead in certain contingencies and which is the only provision of law by which it is possible for the courts to deprive the widow and minors of their homestead, to guard their rights with care. It cannot be used as a device by which adult heirs and other plaintiffs in partition may swallow the homestead or extinguish it by relegating the widow and minors to the value of the homestead or to the net income arising from such value. *Ib.*
16. ———: **Not Subject to Partition.** A homestead as such is not subject to partition. If it can be severed and set apart from the rest of the real estate, it cannot be sold at the partition sale. *Ib.*
17. **Life Insurance: Surrender for Paid-Up Policy: Without Consent of Beneficiaries: Legal Holder.** Since the statutes say that the "legal holder" of a non-forfeitable ordinary-life policy may demand a paid-up policy for an amount computed by a statutory plan, and that the "legal holder" of the policy may himself surrender the policy and thus avoid its self-enforcing provisions for extended insurance, the insured, who within the meaning of such statutes is the "legal holder," may, without the consent of the beneficiaries, surrender a policy upon which he had paid three or more annual premiums, and in lieu thereof receive a paid-up policy for the statutory sum, and that sum being both in accordance with the statute and the stipulations of the policy the company by paying it may be discharged from any further obligations under the policy. *McKinney v. Ins. Co.*, 305.
18. ———: ———: **Separate Estate of Wife.** The statute (Sec. 6944, R. S. 1909) which provides that an insurance policy made payable to the wife of the insured "shall inure to her separate benefit, independently of the creditors" of the husband, was designed to make whatever should come to her upon the payment of the insurance her separate estate and to exempt it from the claims of the creditors of her deceased husband; it does not inhibit the husband from surrendering a policy which names her as beneficiary, and accepting a paid-up policy in lieu thereof. *Ib.*
19. **Libel: Applicable to Civil Cases.** The statute defining libel (Sec. 4818, R. S. 1909) is applicable in civil as well as in criminal cases. *Link v. Hamlin*, 319.
20. **Elections: Voting: Two Names for Same Office.** The statute (Sec. 5909, R. S. 1909) specifically provides that if a ballot contains a greater number of names for any office than the number of persons required to fill such office, it shall be considered as fraudulent as to the whole number of names designated to fill such office. And where two constables for the same district were to be elected, the writing by 38 voters of their own names on or just under the dotted line below the printed names of the two nominated candidates for that office, made those ballots void for all three. *Turpin v. Powers*, 338.

STATUTES AND STATUTORY CONSTRUCTION—Continued.

21. **Collateral Inheritance Tax: On Annual Income.** A bequest of an income for life, or till the legatee's divorce and remarriage, payable annually in monthly installments by a trustee in such sums as he shall deem advisable and just, out of an estate devised in trust for that sole purpose, is not subject to a collateral inheritance tax under Secs. 309-331, R. S. 1909. In re Estate of Clark, 351.
22. ———: ———: **Vested Estate: Contingency.** If property is bequeathed to a trustee with directions to pay annually to a named legatee such a part of the income as the trustee deems advisable and just, the bequest vests and takes effect in immediate possession; and therefore Sec. 314, R. S. 1909, which provides that if the estate be one wherein possession is postponed or contingent the collateral inheritance tax shall not be due until the beneficiary obtains possession of the property, does not impose a tax upon a vested income. Ib.
23. ———: ———: **Indefinite Amount.** If the amount of income which the legatee will annually receive is impossible of ascertainment, Sec. 310, R. S. 1909, affords no basis for the imposition of a collateral inheritance tax. Ib.
24. ———: ———: **Appraisalment.** Since Secs. 322 and 323, R. S. 1909, require the property to be appraised "at its clear market value at the time of the death of decedent," those sections afford no basis for imposing a collateral inheritance tax upon an annual income vested *in praesente* whose amount is indefinite in that it is to be whatever sum the trustee may deem advisable and wise. Ib.
25. ———: **Construction.** Taxation statutes are to be strictly construed, but not so far or so technically as to defeat the intention of the Legislature. But if it cannot be said from an examination of them that the Legislature intended to impose a tax on incomes of a certain sort, an attempted taxation of them cannot be upheld. Ib.
26. **Ejectment: Former Judgment Void Because of Insufficient Prayer:** Sec. 2092, R. S. 1889, and Sec. 2100, R. S. 1909. If the only relief prayed for in the petition in the former action begun in 1908 was that "the defendants may be summoned to show cause why they should not bring an action to try their alleged claim or title thereto, if any they have," the default judgment adjudging plaintiff to be the owner of the land and forever enjoining defendants from asserting title thereto was void, because the petition clearly shows the action was instituted under Sec. 2092, R. S. 1889, which was repealed by the Act of 1897, Laws 1897, p. 74, and because if the judgment granted other relief than that prayed for it would not be binding upon defaulting defendants, since it is expressly provided by Sec. 2100, R. S. 1909, that in such case the relief granted "shall not be other or greater than that which he [the plaintiff] shall have demanded in the petition." Phillips v. Broughton, 365.
27. **Damages: Sec. 5425: Suing for Only \$2000.** The language used in Sec. 5425, R. S. 1909, namely, that defendant "shall forfeit and pay as a penalty the sum of not less than two thousand dollars, and not exceeding ten thousand dollars, in the discretion of the jury," means that the \$2000 is penalty alone, and the amount which plaintiff may recover above that sum is not penalty, but compensation for loss, which is to be established by evidence; and that being true, plaintiff may sue for \$2000 as a penalty, and for that alone, and may forego her right to compensation, if any such right

STATUTES AND STATUTORY CONSTRUCTION—Continued.

she has. [Following *Boyd v. Mo. Pac. Ry. Co.*, 249 Mo. l. c. 126.]
Johnson v. C. M. & St. P. Ry. Co., 418.

28. **Drainage District: Additional Assessment to Meet Bonds: Subsequent Statute Giving Power: Effect on Meaning of Prior Statute: Legislative Construction.** Even if it be true that the Act of 1913, Laws 1913, pp. 274, 281, made specific provisions for an additional levy of assessments to pay debts of a drainage district and such act be considered a legislative construction to the effect that no such power previously existed, that would be only persuasive, and the power to levy additional assessments must still be found in the previous law under which the district was organized, for the Act of 1913 is not retroactive. *State ex rel. v. Redman*, 465.
29. ———: **Final Judgment: Reopening.** The Act of 1905, Laws 1905, pp. 185, 187, contemplated that the charges against all the tracts of land in the drainage district organized in the county court would be large enough to pay the costs of the improvement, including the bonds; but it also contemplated but one action by the court, and that in said action, after the report of the viewers and engineers and its modification upon exceptions filed by land owners, the court's order sustaining the report as modified would become a final judgment, unless appealed from and reversed; and being final, whether the amount was too small or too large, it was still a finality as to the land owner, and could not be corrected or the assessments increased years afterwards when it was discovered that the assessments were not equal to the bonds issued and will not yield enough money to pay the bonds. The law contemplated but the one action by the county court. *Ib.*
30. **Village or Town School District: Division Into Two or More Districts.** Section 10881, Revised Statutes 1909, does not provide a way for dividing a town, city or consolidated school district into two or more districts. Nor do any other statutes provide any direct way by which such division can be accomplished. *State ex inf. v. Sweaney*, 685.

SUMMONS. See *Process*.

TAXES AND TAXATION.

1. **Property Outside State.** A city of Missouri has no power to levy a direct property tax upon subjects of taxation outside the State. The subjects of taxation are persons, property and business, and each must be situate within the jurisdiction of the taxing power to authorize its exercise. *American Mfg. Co. v. St. Louis*, 40.
2. **License a Property Tax.** The *ad valorem* tax levied under our State laws upon merchants and manufacturers, though levied in the form of a license, is a tax upon property, as distinguished from taxes upon business. *Ib.*
3. **Manufacturer's License: Right to Sell Goods Stored Elsewhere.** The city of St. Louis has the power to license and tax manufacturers within its limits, and to prohibit them from pursuing their manufacturing business unless such license is secured; and the tax may be graduated according to the amount of sales; and, hence, the manufacturing company must pay a license tax on goods made in the city, whether they are stored within this State or elsewhere before sale, and whether sold from the company's office in this State or from its principal office located in another State. *Ib.*

TAXES AND TAXATION—Continued.

4. **Public Road Fund: Devoted to Other Uses.** Section 10481, Revised Statutes 1909, in declaring that the tax of not more than twenty cents authorized by it to be credited to the road district from which said tax is collected shall constitute the road fund of the several road districts of the county, forbids the county court to devote the fund to other uses. *Road Dist. v. Ross*, 76.
5. ———: **Discretion of County Court.** The county court has no discretion as to the levying of at least ten cents on the hundred dollars directed by the amendment of 1913 to section 10481, Revised Statutes 1909; its duty to levy and appropriate at least that much to special road districts is compulsory, and it can divert the tax to no other purpose. Its discretion under that section and amendment pertains only to the levy of an additional tax of ten cents on the hundred dollars' valuation. *Ib.*
6. ———: **Meaning of Statutes.** The theory of the statutes (Secs. 10481 and 10483, R. S. 1909) is: (1) that the bridges and roads are to be first taken care of, so far as that duty is devolved upon the districts, by the constitutional levy for county purposes, to the extent at least of ten cents on the hundred dollars' valuation; (2) if that amount is not sufficient for such purpose the county court may raise it to twenty cents; and (3) in its discretion, it may levy the whole or any part of the twenty-five cent special levy authorized by the constitutional amendment of 1908, to be expended in such manner and through such agencies as are charged by law with the establishment, construction and maintenance of roads and bridges. *Ib.*
7. ———: **Transfer to Other Funds: Modified by Road Laws.** Section 3786, Revised Statutes 1909, declaring that "whenever there is a balance in the county treasury to the credit of any special fund, which is no longer needed for the purposes for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance," is still live law as to all the revenue of the county remaining within the control of the county court; but the road fund has by later enactments been removed from the court's control and entrusted to other agents, to be expended by them for a definite purpose. *Ib.*
8. ———: **Diverted to Other Funds.** Revenue for other county purposes cannot be increased at the expense of the roads. The county court after having made a levy of fifty cents on the hundred dollars for county purposes, the maximum tax it is permitted by the Constitution to levy for those purposes, cannot divert ten cents on the hundred dollars of it to other county purposes, but so much of the fifty cents as is collected from property within a special road district as is levied for road purposes must be credited to the treasurer or commissioners of such district. *Ib.*
9. ———: **Discretionary Powers of County Court.** The Legislature has no power to compel the county court to levy the twenty-five-cent tax on the hundred dollars authorized by the constitutional amendment of 1908, but if the tax is levied the county court can apply it to road and bridge purposes, but to no others. But the county court is compelled to levy at least ten cents on the hundred dollars under Sec. 10481, R. S. 1909, for road purposes, and that much at least of the general revenue of the county it must apply to the road districts from which the tax arises, to be spent, not by it, but by the agencies which the statute designates. *Ib.*

TAXES AND TAXATION—Continued.

10. **Money Had and Received: Payment: Before Work is Done: Work Done Before Suit: Purpose of Extension on Assessment Book.** The statute (Sec. 11549, R. S. 1909) which allows compensation to the county clerk for "services rendered" in "extending the taxes on the assessment book" does not designate the time within which the work is to be done, nor fix a penalty for failure to do it before making out and delivering the tax book to the collector, and the act is such that the time of its performance has no effect upon the validity of the tax, and is important only (1) as an aid to the clerk in correctly extending the taxes upon the tax book and (2) as a permanent public record of the amount of the tax in accordance with the final orders of the county and state boards; and in an action by the State to recover back money from the county clerk, paid by the State Auditor before the work of extending the taxes on the assessment book was done, but which was done before the action was instituted, there can be no recovery on the theory either (1) of enforcing a penalty for not doing the work sooner or (2) that the payment having been made, the duty to do it ceased, and its performance thereafter was a work of supererogation. *State ex rel. v. Scott*, 146.
11. **County Taxes: Road Purposes.** The county court in counties in which the assessed valuation of properties is less than six millions, may levy fifty cents on the hundred dollars for county purposes, and set aside fifteen cents of it to improvement of roads; and it can in addition to that fifty cents, levy an additional tax not exceeding twenty-five cents to be used for road-and-bridge purposes but for no other purpose. *State ex rel. v. Railroad*, 251.
12. ———: ———: **Twenty-Five-Cent Levy: Divided Into Two: County Purposes.** The county court levied fifty cents on the hundred dollars' valuation for county purposes, and divided it into five funds, distributing fifteen cents to the fund "for the payment of all necessary expenses incurred in the building and repairing of roads and bridges." The further words of the levy were: "It is further ordered that a property road tax of twenty cents on each one hundred dollars valuation on all property made taxable by law for road purposes be levied and collected for the use and benefit of the respective road districts of the county, when collected to be placed to the credit of said road districts for the purposes specified in the statutes. It is further ordered that a property road-and-bridge tax of five cents on the hundred dollars' valuation be levied on all property made taxable by law, and when collected to be placed to the credit of said Road-and-Bridge Fund as provided by law." *Held*, that the first appropriation of fifteen cents was made in pursuance of the statute as the proportion of the road fund to be derived from the general revenue arising from the maximum levy of fifty cents for county purposes; and the other two levies of twenty and five cents were made under the constitutional amendment of 1908 and Sec. 10482, R. S. 1909, and while no good reason is apparent why the aggregate levy of twenty-five cents should have been thus divided into two, they were both made for the one purpose contemplated by that constitutional amendment and both were legal, and the levy of twenty cents cannot be disposed of as a levy for "county purposes" under section 11 of article 10 of the Constitution. *Ib.*
13. ———: ———: ———: **Not Designated as Special Tax.** The constitutional amendment (Sec. 22, art. 10, Constitution) does not require the name by which the "special tax" of twenty-five cents for road purposes is authorized, to be specified as a part of the record order levying it. The fact that it is levied nominally "for road and

TAXES AND TAXATION—Continued.

bridge purposes" and that it is in excess of the tax authorized by section 11 of article 10 of the Constitution, fixes its status as a special tax, and limits its use when collected. It is only necessary that it should be levied separately from and "in addition to" the levy "authorized for county purposes" and that it should appear to be "for road and bridge purposes." *Ib.*

14. ———: ———: ———: **Use for Other Purposes: Agency Expending It.** The twenty-five cent road tax authorized by the constitutional amendment of 1908 cannot be used for any other purpose than for roads and bridges, but neither the amendment nor the statute designates the particular agency, among those lawfully charged with the duties to which the purpose pertains, by whom it is to be expended. *Ib.*
15. **Sewer: Taxation of Agricultural Lands.** Notwithstanding plaintiff's lands are used largely for agricultural and garden purposes, have not been platted into blocks and lots, constitute 160 of the 1600 acres in the sewer district, and the tax against them to construct the main sewer will be \$36 per acre, and if constructed no laterals from it through the lands are at present contemplated, yet if there are 3500 inhabitants residing within the district, there are churches, schools and hospitals, the sewer is to be constructed along the course of natural drainage, the district is now totally without sewers and there is no other feasible method for draining the lands included therein, and these agricultural lands within the city limits when laterals are constructed can be drained by the main sewer, its construction will not be enjoined on the ground that the ordinances authorizing it are unreasonable and oppressive. *Whitsett v. Carthage, 269.*
16. ———: ———: **Public Health.** All persons hold their property subject to the laws providing for the public health, safety, morals and general welfare; and if a main sewer is necessary for the public health of a large portion of a city, and will benefit not only the parts densely populated but in time the agricultural lands included in the district also, the owners of such lands cannot enjoin its construction on the theory that it is not necessary for the present enjoyment and use of those lands, they cannot be immediately served by it, and the costs to be taxed against them will be very heavy, possibly confiscatory. *Ib.*
17. ———: **Benefits.** It is not only benefits to real estate that are to be considered in sewer construction. Primarily the benefits are conferred on all the people of a district, through sanitation and health conservation, and secondarily on the real estate taxed with the cost, in that it is made more desirable for business and residential purposes and increased in value. *Ib.*
18. ———: ———: **Laterals.** The owners of land not reached by lateral sewers are benefited by laterals which connect other improved lands in the district with the main sewer, since they serve to drain away the refuse that would endanger the public health. *Ib.*
19. ———: **Laterals: Time of Construction.** The law does not require all lateral sewers of a drainage district to be constructed at the same time. They may be constructed as the necessity for them arises, and not before. *Ib.*
20. ———: **Taxes in Proportion to Benefits.** The fact that the benefits to lands taxed with the costs of a sewer do not exactly equal such costs will not invalidate the construction or the tax bills. Approximate equality is all the law requires. *Ib.*

TAXES AND TAXATION—Continued.

21. **Collateral Inheritance Tax: On Annual Income.** A bequest of an income for life, or till the legatee's divorce and remarriage, payable annually in monthly installments by a trustee in such sums as he shall deem advisable and just, out of an estate devised in trust for that sole purpose, is not subject to a collateral inheritance tax under Secs. 309-331, R. S. 1909. In re Estate of Clark, 351.
22. ———: ———: **Vested Estate: Contingency.** If property is bequeathed to a trustee with directions to pay annually to a named legatee such a part of the income as the trustee deems advisable and just, the bequest vests and takes effect in immediate possession; and therefore Sec. 314, R. S. 1909, which provides that if the estate be one wherein possession is postponed or contingent the collateral inheritance tax shall not be due until the beneficiary obtains possession of the property, does not impose a tax upon a vested income. Ib.
23. ———: ———: ———: **Indefinite Amount.** If the amount of income which the legatee will annually receive is impossible of ascertainment, Sec. 310, R. S. 1909, affords no basis for the imposition of a collateral inheritance tax. Ib.
24. ———: ———: ———: **Appraisement.** Since Secs. 322 and 323, R. S. 1909, require the property to be appraised "at its clear market value at the time of the death of decedent," those sections afford no basis for imposing a collateral inheritance tax upon an annual income vested *in presentie* whose amount is indefinite in that it is to be whatever sum the trustee may deem advisable and wise. Ib.
25. ———: ———: ———: **Amount and Duration.** To determine the present value of any limited estate, income or annuity, both the annual amount and the duration thereof must be known; or, the amount must be known and the duration be capable of being averaged by the mortality tables. Ib.
26. ———: **Statutes: Construction.** Taxation statutes are to be strictly construed, but not so far or so technically as to defeat the intention of the Legislature. But if it cannot be said from an examination of them that the Legislature intended to impose a tax on incomes of a certain sort, an attempted taxation of them cannot be upheld. Ib.
27. ———: ———: **Ascertainment Each Month.** To hold that the statutes provide for an ascertainment of the tax due each month from an annual income, to be paid in monthly installments, where the trustee is by the bequest to determine how much will be paid each month, is to give a violent construction to the statute, and one not warranted by its terms. Ib.
28. **Special Tax Bill: Sewer District: Description by Parcels Instead of by Entire Enclosure.** Where the charter provided for the issuance of a "special tax bill against each lot or parcel of ground in the joint sewer district, giving the name of the owner," and declared that "the word 'lot' as used in this section shall be held to mean the lots shown by recorded plats of additions or subdivisions, but if . . . the owners of property have disregarded the lines of lots as platted, and have treated two or more lots or fractions thereof as one lot, then the whole parcel of ground or lots so treated as one, shall be regarded as a lot," tax bills which describe the property by subdivisions and boundaries according to the recorded plat are not void, although the area (Semple Place) covered by the plat has been sold as a body under a prior deed of

TAXES AND TAXATION—Continued.

trust, if there is substantial evidence that there were "parcels of ground" substantially commensurate with the subdivisions outlined in the recorded plat and that they had been so treated by the owners; and there being substantial evidence to support the finding of the trial court on the question, it is not for review on appeal. *Construction Co. v. Realty Co.*, 450.

29. **Duress: Payment of Taxes.** If the law prohibited the corporation from continuing its business unless it possessed a manufacturer's license, and made each day's continuance of its business without such license a separate offense punishable by heavy fine, and forbade the collector to issue a license until the illegal taxes were paid, and required the collector to prosecute the corporation for continuing its business without such license, a payment of the taxes, under protest, to avoid prosecution and to obtain a right to continue its business, was a payment under duress. *State ex rel. v. Reynolds*, 589.
30. ———: ———: **Property Right.** A corporation's potential existence depends on its ability to transact the business for which it was incorporated, and this is a property right; and if a failure to pay illegal taxes will, because of the penalties and inhibitions which the laws impose, prevent a continuance of that business, a payment, to avoid prosecution and to acquire the right to continue the corporate business without molestation, will constitute payment under duress. *Ib.*
31. ———: ———: **Threats: The Law Itself.** If the law under which the license collector was demanding the tax and proceeding to enforce its collection provided that it should "be his duty to prevent any person carrying on any business, object or calling for which such license or license tax is required, without having a license or license receipt for that purpose" and that he should "report to the police court of such city all violations of law or ordinances relating to license and license taxes" and further provided that no manufacturer should continue his business without such license and if he did so he should be liable to a fine of \$500 for each day's continuance, the law itself, coupled with the collector's demand that the manufacturer pay the tax as a final and absolute condition to the issuance of the license, constituted a threat to put the manufacturer out of business unless he paid the tax. *Ib.*
32. ———: ———: **Remedy: Dictated by Defendant.** It does not lie in the mouth of the defendant who has through duress extorted an illegal tax from a manufacturer as the price of his continuing in business, to contend, when the manufacturer sues to recover the amount of the tax thus paid under protest, that his remedy was by writ of mandamus to compel the granting of license upon tender of the tax; for, one who uses his extraordinary powers for purposes of extortion is not privileged to dictate the particular remedy which his victim shall choose from among those which the law affords. *Ib.*
33. ———: ———: ———: **Common Law a Mantle of Justice.** Remedial justice extends itself like a mantle over those things that come within the reason of the law; and when legislative ingenuity devises new plans for the enforcement of its enactments, the common law automatically extends corresponding protection to those who obey them. *Ib.*

TAXES AND TAXATION—Continued.

34. ———: ———: ———: **State as Extortioner.** If the State proceeds by methods of its own making calculated to compel the taxpayer to yield, whether right or wrong, to avoid an overpowering injury, it has no right to complain if, having the bone of contention in its own possession, it must try the right to it on equal terms. *State ex rel. v. Reynolds*, 589.
35. **Payment of Illegal Taxes: Recovery From Collector.** A suit against the city collector, who is the agent of the State in collecting State taxes, to recover back the amount of a State tax illegally demanded and paid to him under duress, cannot be maintained, if he has already transmitted it to the State Treasury. The Legislature alone can give relief in such circumstances. The rule is that where money illegally collected by color of law still remains in the hands of the collector it may be recovered from him by the party paying it; but if it has been paid over by the collector to the proper authorities, he is no longer responsible for it, though it appears he acted under an authority which was void. *Id.*

TELEGRAPH COMPANY. See *Negligence*, 32 and 33.

TORTS. See *Negligence*, 32 and 33.

TRADING STAMPS. See *Forgery*, 1 and 2.

TRUSTS. See *Uses and Trusts*.

USES AND TRUSTS.

Conveyances: Equitable Title: From Husband to Wife: Statute of Uses.

If the estate vested in the wife by a deed directly to her from her husband, made prior to the Married Woman's Act, remained in her until after his death, the Statute of Uses upon his death executed the dry trust, and her deed thereafter conveyed the legal title. *Carson v. Lumber Co.*, 238.

VENUE.

Foreign Corporation. An action by summons against a foreign business corporation duly licensed to do business in this State cannot be instituted in any county other than the county in which either the cause of action accrued or in which the corporation has and usually keeps an office or agent for the transaction of its usual and customary business. If the cause of action accrued in St. Francois County, and the defendant is a New York corporation licensed to do business in this State and maintains an office and agent for the transaction of its usual and customary business in Jefferson County, but has no such office or agent in the city of St. Louis, the suit by a citizen of Illinois cannot be maintained in said city. The word "corporations" used in Sec. 1754, R. S. 1909, comprehends foreign as well as domestic corporations. *State ex rel. v. Jones*, 230.

VIGILANT WATCH ORDINANCE. See *Negligence*, 1 and 2.

WATER RATES. See *Public Utilities*.

WILLS.

1. **Evidence: Objection: Raised First on Appeal.** An objection that a will, the common source of title, was not shown to have been admitted to probate, come too late if made for the first time in appellant's brief. *Schneider v. Kloepple*, 389.
2. **Reasons for Devise.** It was reasonable and natural that a devout Catholic, dying without descendants, should devise his real estate

WILLS—Continued.

- to his wife, to use as she pleased during her life, the remainder at her death to go to a benevolent association of the church of his faith. *Ib.*
3. **Heirs and Assigns Not Used: Intention.** Although the words "heirs and assigns" are not used, a devise, in the absence of words of limitation, conveys the fee, unless the language employed shows a lesser estate was intended. In the latter case, the lesser estate is created. *Ib.*
 4. **Life Estate With Power of Disposal: Remainder: Intention.** The language of a will was: "The real estate I bequeath to my wife Anna Maria Brink to use as she pleases, and at her death what remains is to go to the St. Joseph Catholic Orphan Asylum in St. Louis." *Held*, that an absolute estate in fee was not devised to Anna Maria, but the intention was, by language as clear and unambiguous as the words of creation, to create a remainder; that is, a life estate in her, with power of disposal, the remainder to vest in the Orphan Asylum. *Ib.*
 5. **Indefinite Devisee: Erroneous Name.** A will devised a life estate to testator's wife and the remainder to "the St. Joseph Catholic Orphan Asylum in St. Louis, Missouri." At the date of his death there was no legal entity so named, but there was a corporation entitled "The Managers of the Roman Catholic Orphan Asylum of St. Louis;" and there was then and has continued to exist since a voluntary unincorporated charitable institution known as "The St. Joseph Catholic Asylum," to the support of which the churches of the diocese, including that in which testator worshipped, contributed, but whether the contributions were made directly or indirectly does not appear. Upon the incorporation of "The Managers of the Roman Catholic Orphan Asylums of St. Louis," the property owned by the St. Joseph Catholic Orphan Asylum and other incorporated orphan asylums in St. Louis was turned over to the archbishop of the diocese as president of "The Managers of the Roman Catholic Orphan Asylums of St. Louis," for the benefit of said orphan asylums, and the property subsequently acquired was so held and used. *Held*, that, in spite of the mistake in naming the devisee, the corporation is entitled to take the devise. *Ib.*
 6. ———: **Unincorporated Charitable Institution.** A charitable devise or bequest will be upheld and enforced if made to a voluntary unincorporated association. The corporate character of the devisee is not a prerequisite to the validity of such a devise. *Ib.*
 7. ———: **Erroneous Name.** Where a beneficiary is designated in a will by an erroneous name the bequest will not be avoided, if, by means of the name or by extrinsic evidence, the beneficiary may be identified. *Ib.*
 8. **Contest: Death of Contestants: Revivor: Abatement.** When a will contest has once been instituted by persons who have a direct pecuniary interest in the final determination of the question of whether or not there is a will, the burden of proving the will then rests upon the proponents, and the contest must go forward to a final adjudication; and if the contestants die, the action does not abate, and there is no absolute necessity of a revivor in the name of those who have a financial interest in the result, although upon proper application they may be substituted as contestants, but the administrators of the contestants are not proper parties. *Brauel v. Reuther, 603.*

WILLS—Continued.

9. ———: ———: ———: **Administrator.** Upon the death of the contestants of a will, their administrators should not be substituted as parties. An executor or administrator is not, under the statutes, an interested party to a will contest, either active or nominal. The statute limits the right of action to "persons interested in the probate of wills," and an executor or administrator is not such a person. *Braeuel v. Reuther*, 603.
10. ———: **Testamentary Capacity.** Where if the contestants' evidence is to be believed the testator was without sufficient mind to make a will, and if the evidence for proponents is to be believed he had mind sufficient to make a will, the question of his testamentary capacity is one of fact to be decided by the jury. *Bingaman v. Hannah*, 611.
11. ———: **Due Execution of Will: Knowledge of Contents.** Where there is substantial evidence that testator was possessed of testamentary capacity and the uncontradicted evidence is that the will was read aloud to him, the proper conclusion is that he knew its contents before he affixed his mark to it. *Ib.*
12. ———: ———: **Witnessing: At Request of Testator.** The statute does not require that the testator shall verbally request the subscribing witnesses to attest his will, and the will cannot be destroyed on the sole ground that he did not himself make such request. If after the will was read aloud to testator and he had announced his assent thereto and had affixed his mark to it, the scrivener, in his presence and hearing, requested two competent persons to subscribe their names as witnesses, and they did so in testator's presence, the attestation met the requirements of the statute. *Ib.*
13. **Motion to Strike Out Answer: No Exception.** An assignment that the trial court erred in overruling contestants' motion to strike out proponents' amended answer on the ground that it contradicted the original answer, cannot be reviewed on appeal unless an exception was saved to the ruling and the exception and the motion itself were preserved in a bill of exceptions. *Ib.*
14. **Witness: Ruling of Incompetency: No Offer of Testimony.** The ruling of the trial court that a certain witness offered by appellants was incompetent to testify will not be reviewed on appeal unless the ruling was followed by an offer to prove what the witness's testimony would be if he were permitted to testify. *Ib.*
15. **Contest: Subscribing Witnesses: Cross-Examination.** Where the subscribing witnesses manifest an unwillingness to testify to the mental condition of the testator at the time he subscribed the will, the trial court does not abuse its discretion by permitting proponents to cross-examine them, though their own witnesses, by asking them if they had not sworn in the probate court, upon the original probate of the will, that testator was of sound mind at the time he signed the will. *Ib.*
16. ———: **Subscribing Witnesses: Instructions: Knowledge of Testator: Presence.** The instructions should clearly convey to the jury the idea that in order to find that the will was properly witnessed they should find that it was signed by subscribing witnesses in the presence of the testator and with his knowledge and consent. The word "presence" necessarily includes knowledge of the act and acquiescence therein by the testator, and they can be shown in different ways, namely, by his verbal request, or by any act or con-

WILLS—Continued.

duct upon his part, or by any other evidence which would show that he had knowledge of the attestation and consented to or acquiesced therein. *Ib.*

WRIT OF ERROR.

1. **New Suit.** A writ of error is not, like an appeal, to be considered as a continuation of the original action, but as a new action, which must contain, on its face, the evidence of the right of the plaintiff in error to a review. *Trust Co. v. Traction Co.*, 487.
2. **Specification of Parties.** Although the writ of error is a writ of right, that right differs in no respect from the absolute right to bring an action under the Code of Civil Procedure, which can only be done by petition, specifying, among other things, the names of the parties to the action. So in the writ of error, the plaintiff must be equally explicit as to the identity of the judgment he attacks and those against whom he seeks a remedy. *Ib.*
3. **———: Real Party Not Named.** If neither the name of the party with whom alone is the controversy, nor his judgment by any title which identifies it, is mentioned in the writ, and he does not come within any description contained in it by which he can be identified as the adversary of the plaintiff in error, the writ must be quashed. *Ib.*

Rules of the Supreme Court of Missouri

REVISED AND ADOPTED APRIL 10, 1916.

Rule 1.—Chief Justice, Duty. The Chief Justice shall be elected for a term of one and three-sevenths years, and shall superintend matters of order in the courtroom.

Rule 2.—Motions to be Written, etc. All motions shall be in writing, signed by counsel and filed of record. At least twenty-four hours notice of the filing of same, unless herein otherwise provided, shall be given to the adverse part, or his attorney.

Rule 3.—Argument of Motions. No motion shall be argued unless by the direction of the court.

Rule 4.—Diminution of Record, Suggestion after Joinder in Error. No suggestion of diminution of record in civil cases will be entertained after joinder in error, except by consent of the parties.

Rule 5.—Application for Certiorari. Whenever *certiorari* is applied for to correct a record, an affidavit shall be made thereto of the defect in the transcript sought to be supplied and at least twenty-four hours notice of such application shall be given to the adverse party or his attorney.

Rule 6.—Reviewing Instructions. To enable this court to review the action of the trial court in giving and refusing instructions it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the testimony of the witnesses shall be stated in narrative form, avoiding repetition and omitting immaterial matter.

Rule 7.—Bills of Exceptions in Equity Cases. In equity cases the entire evidence shall be embodied in the bill of exceptions; provided it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to its admissibility or legal effect; and provided further that parole evidence shall be reduced to a narrative form where this can be done and its full force and effect be preserved.

Rule 8.—Presumptions in Support of Bills of Exceptions. In the absence of a showing to the contrary, it will be presumed as a matter of fact that bills of exceptions contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 9.—Making up Transcripts. Clerks of courts in making out transcripts of the record for the Supreme Court, unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause, shall not set out the original or any subsequent writ or the return thereof, but in lieu of same shall simply note the dates respectively of the issuance and execution of the summons.

SUPREME COURT RULES.

If any pleading be amended, the clerk in making out the transcript will only insert therein the last amended pleading and will set out no abandoned pleading or part of the record not called for by the bill of exceptions; nor shall any clerk insert in the transcript any matter touching the organization of the court or any continuance, motion or affidavit not made a part of the bill of exceptions.

Rule 10.—“Appellant” and “Respondent;” What They Include. Whenever the words appellant and respondent appear in these rules they shall be taken to mean and include plaintiff in error and defendant in error and other parties occupying like positions in a case.

Rule 11.—Abstracts in Lieu of Transcript, When Filed and Served. Where the appellant shall, under the provisions of section 2048, Revised Statutes 1909, file a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing, and in a like time file ten copies thereof with our clerk. If the respondent is not satisfied with such abstract, he shall deliver to the appellant an additional abstract at least fifteen days before the cause is set for hearing, and within like time file ten copies thereof with our clerk. Objections to such additional abstract shall be filed with our clerk within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the respondent in like time.

Rule 12.—Abstracts: When Filed and Served. Where a complete transcript is brought to this court in the first instance, the appellant shall deliver to the respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file ten copies thereof with our clerk not later than the day preceding the one on which the cause is set for hearing. If the respondent desires to file an additional abstract he shall deliver to the appellant a copy of same at least five days before the cause is set for hearing and file ten copies thereof with our clerk on the day preceding that on which the cause is to be heard.

Rule 13.—Abstracts: What They Shall Contain. The abstracts mentioned in Rules 11 and 12 shall be printed in fair type, be paged and have a complete index at the end thereof, which index shall specifically identify exhibits when there are more than one, and said abstract shall set forth so much of the record as is necessary to a complete understanding of all the questions presented for decision. Where there is no controversy as to the pleadings or as to deeds or other documentary evidence it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be in narrative form except when the questions and answers are necessary to a complete understanding of the testimony. Pleadings and documentary evidence shall be set forth in full when there is any question as to the former or as to the admissibility or legal effect of the latter; in all other respects the abstract must set for a copy of so much of the record as is necessary to be consulted in the disposition of the assigned errors.

Rule 14.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases ten printed, indexed and uncertified copies of the entire record, filed and served within the time prescribed by the rules for serving abstracts, shall be deemed a full compliance with said rules and dispense with the necessity of any further abstracts.

SUPREME COURT RULES.

Rule 15.—Briefs: What to Contain and When Served. The appellant shall deliver to the respondent a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the appellant at least five days before the last named date, and the appellant shall deliver a copy of his reply brief to the respondent not later than the day preceding that on which the cause is set for hearing, and ten copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed. The brief for appellant shall distinctly allege the errors committed by the trial court, and shall contain in addition thereto: (1) a fair and concise statement of the facts of the case without reiteration, statements of law, or argument; (2) a statement, in numerical order, of the points relied on, with citation of authorities thereunder, and no reference will be permitted at the argument to errors not specified; and (3) a printed argument, if desired. The respondent in his brief may adopt the statement of appellant; or, if not satisfied therewith, he shall in a concise statement correct any errors therein. In other respects the brief of respondent shall follow the order of that required of appellant. No brief or statement which violates this rule will be considered by the court.

In citing authorities counsel shall give the names of the parties in any case cited and the number of the volume and page where the case may be found; and when reference is made to any elementary work or treatise the number of the edition, the volume, section and page where the matter referred to may be found shall be set forth. [As amended and adopted October 23, 1917.]

Rule 16.—Failure to Comply with Rules 11, 12, 13, and 15. If any appellant in any civil case fail to comply with the rules numbered 11, 12, 13 and 15, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error; or, at the option of the respondent continue the cause at the cost of the party in default.

Rule 17.—Costs: When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstract filed in lieu of a complete transcript under section 2048, R. S. 1909, which fails to make a full presentation of the record necessary to be considered in disposing of all the questions arising in the cause. But in cases brought to this court by a copy of the judgment, order or decree instead of a complete transcript, and in which the appellant shall file a printed copy of the entire record as and for an abstract, costs will be allowed for printing the same.

Where a manuscript record has been or may be filed in this court, a reasonable fee for printing an abstract of the record or the entire record in lieu of an abstract may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in cases where costs may properly be taxed for printing, as prima-facie evidence of the reasonableness thereof; and objections thereto may be filed within ten days after service of notice of the amount of such charge.

Rule 18.—Service of Abstracts and Briefs. Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgement of such opposing party or his attorney or the affidavit of the person making the service, and such evidence of service must be filed with the abstract or brief.

Rule 19.—Service of Abstracts and Briefs in Criminal Cases. Attorneys for appellants in criminal cases in which transcripts have

SUPREME COURT RULES.

been filed in the office of the clerk sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement containing apt references to the pages of the transcript, with an assignment of errors and brief of points and an argument, and serve a copy thereof upon the Attorney-General, and thereupon the Attorney-General shall, fifteen days before the day of hearing, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket the court shall designate the time for filing statements and briefs.

When such transcript has been filed in this court fifteen days before the first day of the term at which such case is set for hearing, the appellant or plaintiff in error shall file his statement, brief and assignments of error five days before the first day of such term, and the Attorney-General shall, on or before the first day of the term, file his brief and statement.

Hereafter no statement or brief shall be filed in a criminal case out of time, nor will counsel who violate this rule be heard in oral argument unless for a good cause shown on motion theretofore filed and ruled on before the day set for the hearing of the case.

When appellants have been allowed to prosecute their appeal as poor persons by the trial court, counsel will be permitted to file typewritten statements and briefs. In cases where the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the Attorney-General his brief and statement five days before the hearing.

Rule 20.—Taking Record from Clerk's Office. No member of the bar shall be permitted to take a record from the clerk's office.

Rule 21.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not called through the neglect or inadvertence of counsel; and the question so submitted by counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling decision to which the attention of the court was not called, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard and the motion for rehearing overruled either in division or *En Banc* no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk.

Rule 22.—Extension of Time. Hereafter in no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

Rule 23.—Notice to Adverse Party. A party, in any cause, filing a motion either to dismiss an appeal or writ of error, or to affirm the judgment, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegram, by letter, or by written notice, and shall on filing such motion, satisfy the court that such notice has been given.

SUPREME COURT RULES.

Rule 24.—Transfers to Court En Banc. A motion to transfer a cause under the provisions of the Constitution from either division to court *En Banc* must be filed within ten days after the final disposition of the cause by the division, and notice of such motion shall be given as provided in Rule 23.

Rule 25.—Return of Original Writs. Original writs or other process issued by either division of the court, or by any judge in vacation, may be made returnable to and disposed of by such division, or the Court *En Banc*, as such division or judge in vacation may order.

Rule 26.—Assignment of Motions in Civil Causes. All motions and matters in civil causes which have not been assigned by the Court *En Banc* to a division for final determination, upon the record, shall be presented to, heard and determined by the Court *En Banc*. All matters in civil causes which have been assigned to a division shall be presented to and heard and determined by such division.

Rule 27.—Assignment of Criminal Causes. All criminal causes, and matters pertaining thereto, shall be heard and determined by Division Number Two.

Rule 28.—When Appeal is Returnable: Certificate of Judgment: Transcript. Where appeals shall be taken or writs of error sued out, the appellant shall file a complete transcript or in lieu thereof a certificate of judgment as provided by section 2048, Revised Statutes 1909, within the time provided by said section and the date of the allowance of the appeal and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file within the time allowed by said section 2048 a certificate of judgment, and may thereafter file a complete transcript and an abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term, shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 2048, Revised Statutes 1909.

Rule 29.—Oral Arguments. The time allowed for oral argument and statement shall be an hour and ten minutes for appellant or plaintiff in error, or relator in original proceedings, and fifty minutes for respondent or defendant in error or respondent in original proceedings.

Rule 30.—Letters, etc., to Court. All motions, briefs, letters or communications in any wise relating to a matter pending in this court must be addressed to the clerk, who will lay them before the court in due course. Hereafter any letter or communication relating directly or indirectly to any pending matter, addressed personally or officially to any judge of this court, will be filed with the case and be open to the inspection of the public and opposing parties.

Rule 31.—Record Matters on Appeal. Hereafter an appellant, filing here a certified copy of the order granting an appeal, need not abstract the record entries showing the steps taken below to perfect such appeal. If the abstract state the appeal was duly taken, then absent a record showing to the contrary, by respondent, it will be presumed the proper steps were taken at the proper time and term.

SUPREME COURT RULES.

Hereafter no appellant need abstract record entries evidencing his leave to file, or the filing of, a bill of exceptions. It shall be sufficient if his abstract state the bill of exceptions was duly filed. The burden is then on respondent to produce here the record showing the contrary to be the fact, if he make the point.

Rule 32.—Granting Original Writs. No original remedial writ, except *habeas corpus*, will be issued by this court in any case wherein adequate relief can be afforded by an appeal or writ of error, or by application for such writ to a court having in that behalf concurrent jurisdiction.

Rule 33.—Procedure as to Original Writs. Oral arguments will not be granted on applications for original remedial writs; and before such writs shall issue, the applicant therefor shall give not less than five days' notice thereof to the adverse party, or his attorney. Such notice shall be in writing, accompanied by a copy of the application for the writ, and the suggestions in support of same. The adverse party may file in this court suggestions in opposition to the issuance of the writ, a copy of which he shall, before filing, serve on the applicant. Whenever the required notice would, in the judgment of the court, defeat the purpose of the writ, it may be dispensed with. On final hearing printed abstracts and briefs shall be filed in all respects as is required in appeals and writs of error in ordinary cases. Motions for reconsideration of the court's action in refusing applications for original writs shall not be filed.

Rule 34.—Certiorari to Courts of Appeals. No writ of certiorari shall be granted to quash the judgment of a Court of Appeals on the ground that such court has failed or refused to follow the last controlling decision of the Supreme Court, unless the applicant for such writ shall give all parties to be adversely affected, or their attorneys of record, at least five days' notice of such application; and the applicant shall, in a petition of not exceeding five pages, concisely set out the issue presented to the Court of Appeals and show wherein and in what manner the alleged conflicting ruling arose, and shall designate the precise place in our official reports where the controlling decision will be found. Said petition shall be accompanied by a true copy of the opinion of the Court of Appeals complained of, a copy of the motion for rehearing or to transfer the cause to this court, a copy of the ruling of the Court of Appeals on said motion, and suggestions in support of the petition not to exceed six printed typewritten pages.

The notice to the party to be adversely affected shall be printed or typewritten, accompanied by a true copy of the petition and all exhibits and suggestions in regard thereto. The party to be adversely affected may file, on or before the date fixed by the notice, suggestions of not more than five printed or typewritten pages stating the reasons why such writ should not issue.

